CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 OCTOBER 12, 1994 NO. 41

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 94–75)

REQUIRED INFORMATION ON DRAWBACK CLAIMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of T.D 94–60.

SUMMARY: This notice serves to confirm, and continue, the practice that accelerated payments of drawback may be issued based on unliquidated import entries. Also, as recognized in the Customs duty drawback regulations, drawback claims may be liquidated based upon unliquidated import entries. To this extent, T.D. 94–60, which was published in the CUSTOMS BULLETIN on July 27, 1994, is hereby modified accordingly. Also, T.D. 94–60 is further modified in part to make clear that drawback claims based upon certificates of delivery or certificates of manufacture (CD's or CM's) must reference the CD or CM designation if the import entry information is unavailable. Drawback claimants that have continuous transaction bonds on file with both activity codes "1" and "1a" checked must file a separate drawback continuous transaction bond with activity code "1a" for the amount of drawback they expect to receive in a year.

EFFECTIVE DATE: October 1, 1994.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Office of Trade Operations, (202) 927–0916.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs published T.D. 94–60 in the CUSTOMS BULLETIN on July 27, 1994, in part advising interested parties that, as of October 1, 1994, certain information, as set forth in paragraphs (a)–(d) thereof, would be required on drawback claims filed with the agency. In particular, in paragraph (c) thereof, it was stated that a drawback claim would have to be based on a "liquidated" import entry.

However, accelerated payments of drawback may continue to be issued based on unliquidated import entries. Furthermore, drawback claims are, and will continue to be, liquidated based on unliquidated

import entries if the drawback claimant and any other party responsible for the payment of liquidated import duties each files a written request for the payment of each drawback claim, waiving any right to payment or refund under other provisions of law, as prescribed in § 191.71(b), Customs Regulations (19 CFR 191.71(b)).

CERTIFICATE OF DELIVERY; CERTIFICATE OF MANUFACTURE

If drawback claims are based on certificates of delivery (CD's) or certificates of manufacture (CM's), such claims should reference the CD or CM designation if the import entry information is not available. If a CD or CM is prepared on or after October 1, 1994, and it is the first CD or CM related to a particular import entry (or entries), the CD or CM must reference the import entry number as well as the duty amount for each import entry used in preparing the CD or CM. When the merchandise is delivered to other parties who perform further manufacturing leading to the preparation of additional CM's, only the previous CM designation need be referenced on the drawback claim.

BOND REQUIREMENT

In addition, it will not be necessary to cancel existing continuous transaction bonds with both activity codes checked. However, claimants who now have continuous transaction bonds with both activity codes checked will be required to file a separate continuous transaction bond activity code "1a" for the amount of drawback they expect to receive in a year. This bond must have a new suffix after the IRS number if the bond with activity codes "1" and "1a" is to remain in place. The separate drawback bond will be assigned a new bond number. The existing combination bond will remain on file to cover the import transactions and any claim for drawback up to October 1, 1994.

Drawback claimants are advised that if they choose this new suffix, the IRS number with the new suffix must be used for all drawback transactions in the future. Therefore, it is recommended that claimants terminate their "1, 1a" bond, and obtain a separate drawback bond (activity code "1a") and a separate bond for import entries (activity code "1").

T.D. 94-60 is hereby modified accordingly.

Dated: September 23, 1994.

WILLIAM F. INCH,
(for Samuel H. Banks,
Assistant Commissioner,
Office of Commercial Operations.)

(T.D. 94–76)

DETERMINATION THAT MAINTENANCE OF DETERMINATION/FINDING OF JULY 7, 1992, PERTAINING TO CERTAIN TEA IMPORTED FROM THE PRC IS NO LONGER NECESSARY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Determination that merchandise is no longer subject to 19 U.S.C. 1307.

SUMMARY: On July 7, 1992, the Commissioner of Customs; with the approval of the Secretary of the Treasury issued a determination/finding that certain tea, described as RED STAR Brand Tea, RED STAR TEA FARM Brand Tea, and any other tea produced by the RED STAR TEA FARM in Guangdong Province, People's Republic of China, with the use of convict labor and/or forced labor, and/or indentured labor, was being, or was likely to be imported into the United States. The Commissioner of Customs, pursuant to 19 CFR 12.42(f) has now determined, based upon additional Customs investigation, that such merchandise is no longer being or is likely to be imported into the United States in violation of Section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307).

DATE: This determination shall take effect October 5, 1994.

FOR FURTHER INFORMATION CONTACT: Thomas J. Tinger, Senior Special Agent, Office of Enforcement, Headquarters, U.S. Customs Service, 1301 Constitution Ave., N.W., Washington D.C. 20229 (202) 927–1510.

DETERMINATION

Pursuant to Section 12.42(f), Customs Regulations (19 CFR 12.42(f)), it is hereby determined that certain articles of the People's Republic of China are **no longer** being, or likely to be, imported into the United States, which are being mined, produced or manufactured with the use of convict, forced or indentured labor.

Articles	Item number from the Harmonized Tariff Schedule (19 U.S.C. 1202)
Tea	0902.10.00 0902.30.00
(Manufactured by the Red Star Tea Farm)	

GEORGE J. WEISE,
Commissioner of Customs.

Approved: September 9, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary (Enforcement).

[Published in the Federal Register, September 30, 1994 (59 FR 50038)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 27, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
(for Harvey B. Fox, Director,
Office of Regulations and Rulings.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A HEATER WITH HUMIDIFIER

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a heater with humidifier. Notice of the proposed modification was published August 17, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 33.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or a after December 12, 1994.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 17, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 33, proposing to modify DD 897237, issued on May 3, 1994, by the District Director of Customs, Seattle, Washington, concerning the tariff classification of the Holmes HCM 9000

"humidifier with heating element," under subheading 8509.80.30, Harmonized Tariff Schedule of the United States (HTSUS), which provides for electromechanical domestic appliances, with self-contained electric motor. Two comments were received. The essence of the comments and our response follows:

Comment:

The HCM 9000, which is the subject of DD 897237 is a space heater that incorporates a humidifier rather than a "humidifier with heating element," and that it is classifiable, according to note 3 to section XVI, under subheading 8516.29.00, HTSUS, which provides for electric space heating apparatus.

Response:

We agree. The HCM 9000 consists of a heater and a separate warm mist humidifier in a single housing. The heater can be used with or without the humidifier. It is our opinion that the device is a section XVI, note 3, composite (multi-function) machine, and it is classifiable as it consisting only of the component which performs its principal function. That component is the heater, and the device is therefore classifiable under subheading 8516.29.00, HTSUS.

Comment:

Warm mist humidifiers are not "electrothermic" devices, and therefore should not be classified as electrothermic household appliances under subheading 8516.79.00, HTSUS.

Response:

As the device at issue, the HCM 9000, which consists of a heater and humidifier, will not be classified as an electrothermic domestic appliance under subheading 8516.79.00, HTSUS, it is unnecessary to determine whether a particular warm mist humidifier would be considered "electrothermic" or "electromechanical" for tariff purposes.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 897237 to reflect the proper classification of the product under subheading 8516.29.00, HTSUS. Headquarters Ruling Letter 955025 modifying DD 897237 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 26, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 26, 1994.

CLA–2 CO:R:C:M 956741 LTO
Category: Classification
Tariff No. 8516.29.00

MR. WARREN COE
AMWAY CORPORATION
7575 E. Fulton Road
Department 52–2A
Ada, MI 49355

Re: HCM 9000 heater with warm mist humidifier; DD 897237 *modified;* heading 8509; Section XVI, note 3; EN 85.16.

DEAR MR. COE:

This is in reference to DD 897237, issued to you by the District Director of Customs, Seattle, Washington, on May 3, 1994, which concerned the classification of space heaters, humidifiers and a rechargeable lantern under the Harmonized Tariff Schedule of the United States (HTSUS). This is a reconsideration of the portion of DD 897237 concerning the model SKU No. X–5690 Vendor No. Holmes HCM 9000 heater with warm mist humidifier. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter, "section 625"), notice of the proposed modification of DD 897237 was published August 17, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 33. After consideration of the two comments received in response to the notice, DD 897237 will be modified as set forth in this ruling.

Facts:

The article in question is the model SKU No. X–5690 Vendor No. Holmes HCM 9000 "Total Comfort Heater with Warm Mist Humidifier." The HCM 9000 is a space heater with a separate warm mist humidifier. The device uses an encased Nickel-chrome element for whole room warmth, and a separate insulated, wrap around element for moisture production. The heater and humidifier function independently of each other and both have their own controls and safety shut-off mechanisms.

In DD 897237, the HCM 9000 was held to be classifiable under subheading 8509.80.00, HTSUS, which provides for other electromechanical domestic appliances, with self-contained electric motor.

Issue:

Whether the HCM 9000 heater with warm mist humidifier is classifiable under subheading 8509.80.00, HTSUS, which provides for other electromechanical domestic appliances, with self-contained electric motor.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The HCM 9000 is a space heater with a separate warm mist humidifier. The device uses an encased Nickel-chrome element for whole room warmth, and a separate insulated, wrap around element for moisture production. The heater and humidifier function independently of each other and both have their own controls and safety shut-off mechanisms. The HCM 9000 is not an electromechanical device, and therefore, cannot be classified under heading 8509, HTSUS.

Note 3 to section XVI, HTSUS, provides that "composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function." It is our opinion that the HCM 9000's principal function is space heat-

ing. Accordingly, the device is classifiable under subheading 8516.29.00, HTSUS, which provides for electric space heating apparatus.

Holding:

The model SKU No. X–5690 Vendor No. Holmes HCM 9000 heater with warm mist humidifier is classifiable under subheading 8516.29.00, HTSUS, which provides for electric space heating apparatus. The corresponding rate of duty for articles of this subheading is 3.7% *ad valorem*.

DD 897237, dated May 3, 1994, is modified accordingly.

In accordance with section 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF DICYCLOMINE HYDROCHLORIDE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested patties that Customs is modifying a ruling pertaining to the tariff classification of a drug, dicyclomine hydrochloride (CAS–67–92–5). Notice of the proposed modification was published August 10, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 32.

EFFECTIVE DATE: This decision is effective for "merchandise entered, or withdrawn from warehouse, for consumption on or after December 12, 1994.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 10, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 32, proposing to modify New York Ruling Letter (NYRL) 834698, issued January 11, 1989, by the Area Director of Customs, New York Seaport, concerning the tariff classification on the drug, Dicyclomine Hydrochloride (CAS–67–92–3) from Italy. No comments were received.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is modifying NYRL 834698 to reflect the proper classification of this product, Dicyclomine Hydrochloride, in subheading 2922.19.5000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for: "Oxygen-function amino-compounds: Amino-alcohols, their ethers and esters, other than those containing more than one kind of oxygen function; salts thereof; Other: Other." A copy of Headquarters Ruling Letter 955493 modifying NYRL 834698 is set forth in attachment A to this document.

Publication of rulings or decisions Pursuant to section 623 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 26, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 26, 1994.
CLA–2 CO:R:C:F 955493 ASM
Category: Classification
Tariff No. 2922.19.5000

MR. ALVIN SILVEY
SILVEY SHIPPING CO., INC.
Bldg. 75, Suite 211
North Hangen Road
Jamaica, NY 11430

Re: Modification of New York Ruling Letter 834698 concerning the tariff classification of the drug, Dicyclomine hydrochloride, from Italy.

DEAR MR. SILVEY:

In New York Ruling Letter (NYRL) 834698, issued January 11, 1989, the drug, Dicyclomine hydrochloride, imported from Italy, was classified under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed that ruling and have found it to be in error, only with respect to the classification of Dicyclomine hydrochloride.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter, "section 625"), notice of the proposed revocation of NYRL 834698 was published August 10, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 32.

Facts:

In NYRL 834698, the subject product, Dicyclomine hydrochloride, was classified in subheading 2922.19.1500, HTSUSA, which provides for: "Oxygen-function amino-com-

pounds: Amino-alcohols, their ethers and esters, other than those containing more than one kind of oxygen function; salts thereof: Other: Aromatic: Drugs: Other." We have reviewed that ruling and have found it to be in error. The correct classification follows.

Issue:

What is the proper classification under the HTSUSA of the drug, Dicyclomine hydrochloride (CAS–67–92–5)?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). As stated in GRI 1, the classification is determined first in accordance with the terms of the headings which must be read in conjunction with the relative section and chapter notes. If GRI 1 fails to classify the goods and if the heading and legal notes do not otherwise require, the remaining GRI's are applied in their appropriate order.

Consultation with the New York Customs laboratory has confirmed that Dicyclomine hydrochloride is not an aromatic compound within the meaning of Section VI, Additional U.S. Note 2(a), HTSUSA. Therefore, it is our determination that, based on its chemical structure, Dicyclomine hydrochloride is, in fact, properly classifiable is subheading 2922.19.5000, HTSUSA.

Holding:

In view of the foregoing, the product known as, Dicyclomine hydrochloride, is classified in subheading 2922.19.3000, HTSUSA, the provision for "Oxygen-function amino-compounds: Amino-alcohols, their ethers and esters, other than those containing more than one kind of oxygen function; salts thereof: Other: Other." Accordingly, NYRL 834698, dated January 11, 1989, is hereby modified.

In accordance with section 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE COUNTRY OF ORIGIN OF SHEETS

ACTION: Notice of proposed modification of a country of origin ruling.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the country of origin of certain sheets.

DATE: Comments must be received on or before November 14, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, MN, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Textiles Classification Branch, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1920 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), This notice advises interested parties that Customs intends to modify a ruling pertaining to the country of origin of certain fitted sheets.

New York Ruling Letter (NY) 878608, issued October 6, 1992, by the Area Director of Customs, New York Seaport, ruled that the country of origin of certain fitted sheets was the country where the sheets were cut on two sides and pockets at each of the four corners were cut, sewn, and closed with elastic.

After reviewing the matter at the request of the Area Director, New York Seaport, Customs agrees with the Area Director that the determination in NY 878608 of the country of origin of the fitted sheets is not in accord Customs current position concerning the interpretation and application of section 12.130, Customs Regulations (19 CFR § 12.130). § 12.130 states that a textile or textile product consisting of materials processed in more than one foreign country shall be a product of the country where the last substantial transformation occurs. It also provides that a textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

In rulings by Customs Headquarters, fabric has been ruled to have undergone a substantial transformation into fitted sheets *if it was cut on four sides* in addition to the cutting of the pockets and the adding of elastic at each of the four corners.

Customs intends to revoke NY 878608 to reflect that the proper country of origin of the goods is the country where the fabric was woven. Before taking this action, consideration will be given to any written comments timely received. NY 878608 is Attachment A to this document. The proposed ruling modifying NY 878608 is Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 20, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 6, 1992.

CLA–2–:S:N:N3H: 349 878608
Category: Classification
Tariff No. 6302.21.2040, 6302.22.2020,
6302.31.2020, and 6302.32.2030

MR. DARRYL GOLDEN
NORMAN KRIEGER, INC.
CUSTOMS BROKER
P.O. Box 92599
Los Angeles, CA 90009

Re: The tariff classification of fitted sheets and pillowcases from Kenya.

DEAR MR. GOLDEN:

In your letter dated September 23, 1992, on behalf of Atlas Textile you requested a tariff classification ruling.

The submitted samples are two fitted bed sheets and two pillowcases. The fitted bed sheets measure approximately 37 inches by 76½ inches, and will be lade in either a woven blend of 60 percent cotton/40 percent polyester or 55 percent polyester/45 percent cotton. The pillowcases measure approximately 19 inches by 31 inches, and will he made in 100 percent cotton woven fabric or either in a woven blend of 60 percent cotton/40 percent polyester or 55 percent polyester/45 percent cotton. The fitted sheets are printed in a leaf design; each corner has a piece of sewn elastic around it allowing the corners to fit securely over a mattress. The pillowcases are not printed and are blue and peach in color.

In your letter, you inquire as to the country of origin of the pillowcases and fitted bed sheets. You state fabric which is woven, finished, bleached, dyed or printed in Pakistan is shipped to Kenya for cutting and sewing. In addition, the fabric for the fitted sheet is stitched on two sides and at each of four corner's pockets are cut and sewn closed with elastic. The country of origin for the fitted sheets and pillowcases will be Kenya. Headquarters Ruling Letter (HRL) 950780 of August 14, 1992, ruled on a similar issue and it was held the fitted bed sheet and pillowcase were substantially transformed in the second country. A copy of HRL 950780 is attached for your reference.

The applicable subheading for the fitted sheets in chief weight of cotton will be 6302.21.2040, Harmonized Tariff Schedule of the United States (HTS), which provides for articles bed linen, table linen, toilet linen and kitchen linen; other bed linen, printed: of cotton: other * * * sheets not napped. The rate of duty will be 7.6 percent *ad valorem*.

The applicable subheading for the fitted sheets in chief weight polyester will be 6302.22.2020, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen printed: of man-made fibers: other * * * sheets. The rate of duty will be 13 percent *ad valorem*.

The applicable subheading for the pillowcases in chief weight cotton will be 6302.31.2020, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen: of cotton: other * * * pillowcases other than bolster cases; not napped. The rate of duty will be 7.6 percent *ad valorem*.

The applicable subheading for the pillowcases in chief weight polyester will be 6302.32.2030, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen: of man-made fibers: other * * * pillowcases, other than bolster cases: not napped. The rate of duty will be 13 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer, handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 CO:R:C:T 956030 PR
Category: Classification

MR. DARRYL GOLDEN
NORMAN KRIEGER, INC.
P.O. Box 92599
Los Angeles, CA 90009

Re: Reconsideration and modification of Customs Headquarters Ruling (HQ) 951210 concerning the country of origin of sheets.

DEAR MR. GOLDEN:

This is in reference to New York Ruling Letter (NY) 878608, issued October 6, 1992, by the Area Director of Customs, New York Seaport, addressed to your company, concerning the country of origin of sheets. We have reviewed that ruling and determined that it is in error. This modifies that ruling.

Facts:

According to the information contained in NY 878608, fitted bed sheets are made in Kenya from fabric woven, bleached, dyed or printed, and finished in Pakistan. In Kenya, The fabric is stitched on two sides and each of the four corner pockets are finished by cutting, sewing, and adding elastic. The ruling does not state whether the fabric is shipped to Kenya in rolls or in cut pieces, but since the ruling does state that the fabric "is stitched on two sides" in Kenya, we assume that the fabric is exported from Pakistan in roll form and is cut to length (but not width) in Kenya.

Issue:

The issue presented is which country, Pakistan or Kenya is the country of origin of the subject sheets.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed *by means of substantial manufacturing or processing operations* into a new and different article of commerce.

In applying the above criteria, Customs has taken the view that when fabric formed in one country is converted to fitted sheets in a second country, in order to the second country to be the country of origin of the sheets, among other things, all four sides of the sheets must be cut and hemmed in that second country (see *e.g.* HQ 955780, dated May 17, 1994; HQ 954872, dated December 2, 1993; HQ 954710, dated October 7, 1993). Since the fitted sheets which were the subject of NY 878608 were only cut and hemmed on two sides in Kenya, the processing in that country did not constitute a substantial transformation.

Holding:

The country of origin of the fitted sheets described in NY 878608 is Pakistan. NY 878608, dated October 6, 1992, is hereby modified to reflect this holding.

JOHN DURANT,
Director,
Commercial Rulings Division.

DATES AND DRAFT AGENDA OF THE FOURTEENTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE CUSTOMS COOPERATION COUNCIL

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the fourteenth session of the Harmonized System Committee of the Customs Cooperation Council.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of, the Customs Cooperation Council.

FOR FURTHER INFORMATION CONTACT: Myles B. Harmon, Director, International Nomenclature Staff, U.S. Customs Service (202–482–7000) or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2592).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the United States' tariff, the Harmonized Tariff Schedule of the United States ("HTSUS"). The Harmonized, System Convention is under the jurisdiction of the Customs Cooperation Council ("CCC").

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next session of the HSC, will be its fourteenth, and it will be held from November 7 to November 18, 1994.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (pub, L. 100–418), the Department of the Treasury, represented by the U.S. Customs Service, the Department of Commerce, represented by, the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the CCC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC, Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals.

Dated: September 26, 1994.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Attachment: Attachment A]

ATTACHMENT A
38.801 E

DRAFT AGENDA FOR THE FOURTEENTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE

Monday, November 7, 1994 (10 a.m.) to Friday, November 16, 1994

N.B. Questions under Agenda Item VI will be examined first by the presessional Working party (Wednesday, November 2 (10 a.m.) to Friday, November 4 1994).

I

ADOPTION OF THE AGENDA

Draft Agenda	Doc. 38.801
Draft Timetable	Doc. 38.802

II

REPORT BY THE SECRETARIAT

1. Position regarding Contracting Parties to the HS Convention; status of Recommendations; list of administrations applying an HS-based tariff; list of HS-based tariffs available in the Secretariat	Doc. 38.803
2. Report of the policy Commission (31st Session) and decisions taken by the Council at its 83rd/84th Sessions	Doc. 38.804
3. Approval of decisions taken by the harmonized System committee at its 13th Session	Docs. 38.761 38.882
4. Technical assistance activities of the Nomenclature and Classification Directorate	Doc. 38.806
5. Progress report on the HS Commodity Data Base	Doc. 38.807
6. Co-operation with other international organizations	Doc. 38.808
7. Survey of Contracting Parties: collection and Reporting of import and export statistics	Doc. 38.805
8. Other	

III

GENERAL QUESTIONS

1. Measures which could be taken to enable Contracting Parties to implement the 1992 and 1995 versions of the Harmonized System	Doc. 38.809
2. Creation of a database of CCCN/HS documentation: budget estimates	Doc. 38.810
3. Preparation of HSC documents and reports	Doc. 38.811
4. Next HS Review cycle	Doc. 38.812
5. Pre-entry classification information system	Doc. 38.844
6. Co-operations between the Harmonized System Committee and the Technical Committee on the Rules of Origin	Doc. 38.845
7. Date of entry into force of Harmonized System amendments and the fiscal years of Member administrations	Doc. 38.887
8. Further action to be taken with regard to the suggestions made at the Abuja and Hangzhou seminars	Doc. 38.906
9. Other	

IV

REPORT OF THE HS REVIEW SUB-COMMITTEE

V

SITUATION REGARDING COUNCIL RECOMMENDATIONS RELATING TO THE HARMONIZED SYSTEM FOLLOWING THE INTRODUCTION OF THE 1996 VERSION OF THE HS

VI

REPORT OF THE PRESESSIONAL WORKING PARTY

VII

FURTHER STUDIES

1. Classification of "burdock"	Docs. 38.826 38.993
2. Classification of "Dr. Dünner Evening Primrose Oil" put up in capsules	Doc. 38.827
3. Scope of the term "prepared meal"	Doc. 38.828
4. Classification of "Bach Flower" preparations and "Schwedenbitter"	Docs. 38.829 38.979
5. Amendments to the Explanatory Notes to headings 27.14 and 27.15 arising from the classification of "Orimulsion" in heading 27.14	Docs. 38.830 38.995
6. Classification of lubricating preparations containing a high percentage of solvents	Doc. 38.831
7. Classification of "Mater-Bi"	Doc. 38.832
8. Amendment to the Explanatory Note to heading 84.80	Doc. 38.833
9. Classification of an uniterruptible power supply	Doc. 38.834
10. Possible amendment to subheading 8542.12 arising from the amendment to the Explanatory Notes to headings 85.42 and 85.43	Doc. 38.835
11. Classification of "Gamma Grip" and "Gamma Hi-Tech"	Docs. 38.836 38.986 38.987
12. New Subheading Explanatory Note to subheading 9503.70 concerning the classification of toy sets	Docs. 38.837 38.945
13. Separate identification of certain types of "waste in the Harmonized System	Docs. 38.838 38.994
14. Classification of "Lactacyd" and "Dermacide"	Doc. 38.839

VIII

NEW QUESTIONS

1. Definition of the expression "blocks, slabs and bars" in heading 18.05	Docs. 38.555 (HSC/13) 39.013
2. Classification of products containing a substantial quantity of chocolate (chocolate coated wafers)	Docs. 38.580 (HSC/13) 38.886
3. Classification of fruits in alcohol	Doc. 38.624 (HSC/13)
4. Classification of products consisting of paper covered with polyethylene and/or aluminum, to be used for the manufacture of packagings for beverages	Doc. 38.548 (HSC/13)
5. Classification of a hand-held battery-operated sewing machine	Docs. 38.579 38.717 (HSC/13)

NEW QUESTIONS—continued

IX

OTHER BUSINESS

List of questions which might be examined at a future session ..... Doc. 38.843

X

ELECTIONS OF CHAIRMEN AND VICE-CHAIRMEN OF THE HARMONIZED SYSTEM COMMITTEE AND ITS WORKING PARTY AND OF THE HS REVIEW SUB-COMMITTEE

XI

DATES OF THE NEXT SESSIONS

SCIENTIFIC SUB-COMMITTEE

8th Session

Monday, January 9, 1995
Friday, January 13, 1995

HARMONIZED SYSTEM REVIEW SUB-COMMITTEE

11th Session

Monday, February 27, 1995
Friday, March 10, 1995

HARMONIZED SYSTEM COMMITTEE

Working Party

Wednesday, March 29, 1995
Friday, March 31, 1995

15th Session

Monday, April 3, 1995
Thursday, April 13, 1995

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–144)

INDEPENDENT RADIONIC WORKERS OF AMERICA, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 86–12–01551

[ITA determination remanded.]

(Dated September 16, 1994)

Collier, Shannon, Rill & Scott (Paul D. Cullen, Jeffrey S. Beckington, Mary T. Staley, David C. Smith, Jr. and *Gail S. Usher)* for plaintiffs Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO).

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for plaintiff-intervenor Zenith Electronics Corporation.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Priya Alagiri,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Sukhan Kim, Warren E. Connelly, P.C. and *Margaret L.H. Png)* for defendant-intervenors Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on three motions Pursuant to USCIT Rule 56.2 for judgment upon the agency record. The motions have been brought by (1) the Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO) (collectively "the Unions"), (2) Zenith Electronics Corporation, and (3) Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively "Samsung"). To facilitate adjudication of the issues, the court has consolidated these separate challenges to the determination of the International Trade Administration of the United States Department of Commerce ("ITA" or "Commerce") in *Color Televisions Receivers from Korea,* 51 Fed. Reg. 41,365 (Dep't Comm. 1986) (second final admin. review).

STANDARD OF REVIEW

As this consolidated action constitutes challenge to the final determination of an administrative review, the applicable standard of review is whether the final determination is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

I. *Adjustment for Value-added Taxes and Assumption of Pass-Through:*

In its final determination, Commerce chose to account for home market value-added taxes ("VAT") forgiven as a result of exportation by "subtract[ing] the full amount of these taxes from foreign market value." 41 Fed. Reg. at 41,365. The governing statute, in contrast, directs an increase to United States price ("USP") for rebated or uncollected VAT up to the amount of VAT added to the price of similar merchandise sold in the home country. 19 U.S.C. § 1677a(d)(1)(C) (1988). The Federal Circuit's decision in *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1581 (Fed. Cir. 1993), holds that the adjustment must be made to USP, not to foreign market value ("FMV"). *See also Avesta Sheffield, Inc. v. United States,* 838 F. Supp. 608, 614 (Ct. Int'l Trade 1993). Commerce has acknowledged that a remand is necessary to correct the error by increasing Samsung's FMV to its former value and making an appropriate adjustment to USP.

In order to comply with *Zenith,* Commerce has implemented a revised methodology to adjust USP for VAT. *See Ferrosilicon from Brazil,* 59 Fed. Reg. 732, 733 (Dep't Comm. 1994) (final determ. of sales at less than fair value). To determine the amount that is to be added to USP, Commerce currently applies the home market tax rate to the exported merchandise at the same point in the U.S. chain of commerce at which the foreign tax is applied to home market sales. *Id.* Commerce then "adjust[s] the USP tax adjustment and the amount of tax included in FMV" to account for expenses deducted in calculating FMV and USP. *Id.* This secondary adjustment to the taxes is designed to "prevent the new methodology * * * from creating antidumping duty margins where no margins would exist if no taxes were levied upon foreign market sales." *Id.* This methodology was recently upheld by the court in *Torrington Co. v. United States,* 854 F. Supp. 446, 448–49 (Ct. Int'l Trade 1994). The court accepts Commerce's acknowledgement of its error on this point and remands the determination for Commerce to reinstate the original FMV value and to adjust USP in accordance with its new methodology.[1]

In calculating the VAT adjustment, Commerce assumed a full pass-through for the merchandise on review. 51 Fed. Reg. at 41,365. The Federal Circuit has held that Commerce is not required to measure pass-through and the Supreme Court has declined to review the issue.

---

[1] Although Zenith and the Unions accept the application of the new methodology, Samsung argues that this court should leave Commerce "free to apply a methodology which complies with the Federal Circuit's eventual directive." Def.-Ints.' Resp. Br. Opp'n to Pls.' Mot. J. Agency R. at 6. This matter is now well-settled in this court and no purpose would be served by reopening the issue.

Daewoo Elecs. Co. v. United States, 6 F.3d 1511, 1517 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994); *see also Chang Tieh Indus. Co. v. United States*, 840 F. Supp. 141, 147 (Ct. Int'l Trade 1993). Therefore, on remand, Commerce is not required to measure pass-through in recalculating the VAT adjustment.

II. *Treatment of Certain Sales as Purchase Price or Exporter's Sales Price Transactions:*

Under the applicable statute, USP "means the purchase price ["PP"], or the exporter's sales price ["ESP"], of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a) (1988). The ESP is "the price at which merchandise is sold or agreed to be sold in the United States, *before or after* the time of importation." *Id.* § 1677a(c) (1988) (emphasis added). The statute defines PP as "the price at which merchandise is purchased, or agreed to be purchased, *prior* to the date of importation." *Id.* § 1677a(b) (1988) (emphasis added).

During the review period, the U.S. subsidiary of Samsung Electronics Co., Samsung Electronics America, arranged sales of Korean televisions to unrelated customers. 51 Fed. Reg. at 41,365. These purchases were arranged prior to the importation of the products. *Id.* Commerce's consistent practice at that time was to delineate between PP transactions and ESP sales based upon when they were completed. *See PQ Corp. v. United States*, 11 CIT 53, 60 & n.8, 652 F. Supp. 724, 731 & n.8 (1987). Sales made to an unrelated buyer prior to importation were automatically classified as PP transactions. *Id.* As a result, Commerce treated the sales at issue as PP transactions rather than ESP sales. *See* 51 Fed. Reg. at 41,365.

In 1987, two months after the challenged determination was published, this court issued its opinion in *PQ Corp.* The court held that "[t]he mere fact that a sale was made prior to importation does not provide a sufficient basis for applying PP rather than ESP * * *. Thus, where a sale is made to an unrelated party prior to importation, the determination of whether PP or ESP applies must be based upon additional circumstances." *PQ Corp.*, 11 CIT at 60, 652 F. Supp at 731.

In response to the holding of *PQ Corp.*, Commerce developed a test to determine and consider the "additional circumstances" that this court had specified were necessary to support a finding that a sale to an unrelated party was a PP transaction. Under this three-part test,

> [(1)] the manufacturer must ship the merchandise directly to the unrelated buyer, without introducing it into the related selling agent's inventory. [(2)] This procedure must be the customary sales channel between the parties. [(3)] The related selling agent located in the United States must act only as a processor of documentation and a communication link with the unrelated buyer.

Borusan Holding A.S. v. United States, 16 CIT 278, 281 (1992) (footnote omitted). The Unions contend that Commerce should be directed on remand to classify these sales as ESP transactions. Commerce also requests a remand to allow it to consider "additional circumstances" in

determining whether PP or ESP should apply. Samsung protests that this court should not apply the holding in *PQ Corp.* or the subsequently developed test because Commerce's determination was in accordance with its practice at the time of the review period. Samsung believes that a remand would be a retroactive application of the law and asserts that it would be prejudiced thereby.

This court must apply the law now in effect, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd.,* 416 U.S. 696, 711 (1974). Samsung's reliance on *National Corn Growers Ass'n v. Baker,* 840 F.2d 1547, 1555 (Fed. Cir. 1988), for the proposition that Samsung had a right to rely on administrative practice at the time it structured export sales is unavailing. Commerce's administrative practice "still must be lawful, which is for the courts finally to determine." *Brother Indus., Ltd. v. United States,* 15 CIT 332, 338, 771 F. Supp. 374, 381 (1991). In *PQ Corp.* this court determined that distinguishing between PP and ESP transactions solely on the basis of timing was unlawful.

Therefore, a remand is ordered on this issue so that Commerce may, in accordance with the statute, determine whether Samsung's sales are to be treated as PP or ESP transactions once it has reviewed the additional circumstances required by *PQ Corp.* To avoid prejudice to Samsung, Commerce should allow Samsung the opportunity to offer evidence to support its claim for PP treatment.[2]

III. *Adjustments to Exporter's Sales Price Transactions for U.S. Commissions and Indirect Selling Expenses:*

Pursuant to 19 U.S.C. § 1677a(e)(1) and (2) (1988), adjustments to ESP should be made to reflect

> (1) commissions for selling in the United States the particular merchandise under consideration, [and]
>
> (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise ["indirect expenses"].

Id. Under the regulations, an offset adjustment is made to FMV to account for differences in commissions and, in ESP transactions, indirect selling expenses. 19 C.F.R. § 353.56(b)(1), (2) (1994).

Samsung employed commissioned agents in the United States to sell its merchandise. 51 Fed. Reg. at 41,365–66. Samsung claimed an adjustment to its ESP sales for the amount of the commissions paid to these agents and for the indirect selling expenses incurred. *Id.* Believing adjustments to ESP had been made, Commerce authorized an offset to FMV pursuant to its regulations. *See* 19 C.F.R. § 353.56(b). Commerce now admits that it failed to make the original adjustments to ESP. Thus, remand is ordered to allow Commerce to recalculate ESP, accounting for U.S. commissions and U.S. indirect selling expenses.[3]

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[2] None of the parties objects to reopening of the record for this purpose.

[3] The Unions have chosen not to pursue their initial challenge to ITA's decision to combine the ESP offset with the Commission offset.

IV. *Offset of Imputed Credit Expense Formula:*

The statutory section relating to circumstances of sale ("COS"), provides:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> * * * * * * *
>
> (B) other differences in circumstances of sale; * * *
>
> * * * * * * *
>
> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (1988). Pursuant to this provision Commerce adjusted the FMV of Samsung's merchandise for credit expenses. 51 Fed. Reg. at 41,366–67. A credit expense occurs when a seller sells the merchandise on credit and in doing so incurs an expense during the period for which it has not been paid for the merchandise.

In order to calculate Samsung's credit expenses, Commerce used an imputed credit expense formula. *Id.* Commerce measured the average duration of accounts receivable to determine the average period for which Samsung needed to obtain working capital financing to cover the sales it had made on credit. *See id.* The Korean Government's policy not to collect excise taxes on the merchandise immediately after the sale prompted Commerce to mitigate its calculation of the credit expense adjustment to account for the average time between payment of taxes and the receipt of payment. *Id.* at 41,366. Thus, the number of days used by Commerce to calculate the credit expense was reduced by those days during which the taxes were unpaid.

The Unions maintain that Commerce's calculation of the credit expense should be further offset by the average duration of accounts payable. The Unions assert that a delay in payment to suppliers affects the short-term capital requirements by reducing the need for working capital financing. Furthermore, the Unions contend that Commerce's decision not to take into account the average duration of accounts payable is inconsistent with the offset for the lag time between the sale and payment of taxes.

Both Samsung and Commerce rely upon the holding in *Federal-Mogul Corp. v. United States,* 839 F. Supp. 881 (Ct. Int'l Trade 1993), as rejecting the Unions' contention that home market selling expenses should be used to offset a COS adjustment to FMV. In *Federal-Mogul,* the ITA on remand determined that a COS adjustment should not be reduced by the delay in payment of home market selling expenses, *i.e.,* the duration of accounts payable. *Id.* at 884–85. The ITA reasoned that an adjustment for delayed payment would not be reasonably identifiable and quantifiable, as required by the legislative history. *Id.* at 885 (quoting H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979)).

Commerce also asserted in *Federal-Mogul* that its practice was in accordance with the applicable regulation, which allowed for adjust-

ments for differences in selling costs that are "assumed by the producer or reseller on behalf of the purchaser from that producer or reseller." 19 C.F.R. § 353.56(a)(2) (1991). Commerce believed that an adjustment for credit expenses satisfied this relationship, while an adjustment for accounts payable "would involve imputing expenses incurred not between the buyer and seller, but *between the seller and supplier.*" *Federal-Mogul,* 839 F. Supp. at 885 (quoting Final Results of Redetermination Pursuant to Court Remand (Sept. 2, 1993), at 10–11). The court concluded that the ITA "is not required to factor in the effects of delayed payment of home market selling expenses on these COS adjustments." *Id.* at 886. The court does not find the Unions' distinction of *Federal-Mogul* to be viable. Thus, Commerce is not required to offset the COS adjustment for credit expenses by the average duration of accounts payable.

V. *Samsung's Advertising and Warranty Expenses:*

Commerce made an adjustment to Samsung's FMV for home market advertising and warranty expenses pursuant to the regulations at that time, which stated that "*reasonable* allowances generally will be made * * * involving differences in credit terms, guarantees, *warranties,* * * * and assumption by a seller of a purchaser's *advertising* or other selling costs." 19 C.F.R. § 353.15(b) (1986) (emphasis added) (currently codified at 19 C.F.R. § 353.56(a)(2) (1994)). Commerce reviewed Samsung's sales for the period of April 25, 1984 to March 31, 1985. Due to the nature of these expenses, Samsung was unable to provide a daily breakdown of its advertising and warranty expenditures or to link these figures to specific sales. As a result, Samsung provided Commerce with monthly totals for these expenses.

Commerce chose to prorate "advertising expenses, which includes expenses outside the review period[,] over sales made during that same period." 51 Fed. Reg. at 41,367. Commerce concluded that "[b]ecause an advertising claim is by nature not sales-specific, a reasonable estimate is acceptable." *Id.* With regard to warranty expenses, Commerce stated that "[b]ecause Samsung allocated its home market warranty expenses over sales during the same time period, we believe that Samsung's claimed adjustment accurately reflects its expenses for the review period." *Id.*

The Unions protest that Commerce's methodology in determining these expenses is unlawful because Commerce used expenses in its calculation that occurred outside of the review period. The Unions argue that this methodology may have allowed Samsung to manipulate the determination by artificially decreasing its dumping margins, because the April expenses were uncharacteristically high. They request that the court remand this determination to require Commerce to recalculate Samsung's advertising and warranty expenses by eliminating the April expenses altogether.

The court agrees that these expenses are of a nature that prevents a sales-specific calculation. *See Smith-Corona Group v. United States,* 713

F.2d 1568, 1581 (Fed. Cir. 1983) ("In a purely metaphysical sense, * * * ad expense cannot be directly correlated with specific sales."), *cert. denied*, 465 U.S. 1022 (1984). Thus, some allocation must be made in order to follow the regulations. Furthermore, this allocation methodology is not contrary to Commerce's standard practice. In fact, Commerce has used a pro rata allocation method in other determinations. *See, e.g., Porcelain-on-Steel Cooking Ware from Mexico*, 55 Fed. Reg. 21,061, 21,061–62 (Dep't Comm. 1990) (final admin. results) (allocating aggregate commission expenses over all sales instead of linking actual expenses to individual sales).

In *Smith-Corona*, the Federal Circuit upheld a reasonable allocation methodology to determine advertising expenses. 713 F.2d at 1581–82. In *Smith-Corona*, certain advertisements for the subject merchandise also promoted other products or included commemorative announcements. *Id.* at 1581. The court upheld ITA's attempts to "isolate that portion of advertising expense that was properly adjustable," *id.*, as the allocation was made "on the basis of actual, verified cost data." *Id.* at 1582. In this case, Commerce has verified the cost data for Samsung's advertising and warranty expenses, *see* Def.'s Mem. Partial Opp'n to Def.-Ints.' Mot. J. Agency R., Conf. App., Ex. 1, at 34–42, and has made a reasonable allowance for those expenses by prorating them over the six days included in the review period. Its methodology is therefore sustained.

VI. *Indirect Versus Direct Selling Expenses:*

A. Credit Sale Rebates

Samsung granted rebates to its home market distributors who sold to consumers on credit pursuant to a rebate program known as Shin Yong Pan Mae ("SYPM"). To calculate a per unit amount of the rebate, Samsung divided the total amount of rebates paid on the subject merchandise by the total amount of sales revenue for the subject merchandise. Samsung then multiplied the resulting percentage by the price of each individual home market sale under investigation.

Commerce treated the SYPM rebates as indirect selling expenses, explaining that "[b]ecause in our review we examine sales between the manufacturer and the unrelated dealer, we cannot tie the claimed rebates during the period to the manufacturer's sales during the period." 51 Fed. Reg. at 41,377. The final determination referred back to the results of the first administrative review, *id.*, which stated, "[b]ecause the rebate is triggered by and occurs at the time of sale from the dealer to the end user, the rebate could occur at any time subsequent to the sale from the manufacturer to the dealer." *Color Television Receivers from Korea*, 49 Fed. Reg. 50,420, 50,427 (Dep't Comm. 1984) (final admin. review). The first review determination likewise characterized the SYPM rebates as indirect. *Id.*

Congress intended that the foreign market value be adjusted for differences in circumstances of sale that are "directly related to the sales under consideration." H.R. Rep. No. 317, at 76. If USP is being determined on the basis of exporter's sales price, additional adjustments may

be made for indirect selling expenses, *i.e.*, "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." 19 U.S.C. § 1677a(e)(2).

The Federal Circuit has concluded that the use of an appropriate allocation methodology "does not deprive * * * rebates of their direct relationship to the sales under consideration." *Smith-Corona,* 713 F.2d at 1580. The methodologies deemed appropriate by the Federal Circuit included "apportioning the expense among the various models sold and dividing by the quantity of each model sold" and dividing the total amount of the rebate by the total number of products sold subject to rebate. *Id.* The reasonableness of these methodologies was derived in part from the facts that the rebates were actually paid, the effective cost to the manufacturer was increased by the amount of the rebates, and the apportionment was made on the basis of actual, verified data. *Id.*

This court has distinguished *Smith-Corona* in circumstances where (1) the manufacturer's actual cost data does not establish a direct link between a rebate and the sale of merchandise within the scope of investigation and (2) rebates were not assessed as a fixed percentage of sales. *NSK Ltd. v. United States,* 843 F. Supp. 1503, 1505 (Ct. Int'l Trade 1994); *Koyo Seiko Co. v. United States,* 16 CIT 539, 542–43, 796 F. Supp. 1526, 1530 (1992).

In *NSK,* the manufacturer sold in-scope and out-of-scope merchandise, keeping records of discounts on a customer-specific rather than product-specific basis. 843 F. Supp. at 1505. Discounts were allocated to in-scope merchandise by applying "a ratio of total discount to total sales for each customer." *Id.* The court found that in the absence of evidence that the manufacturer offered the same discounts on in-scope merchandise as on out-of-scope merchandise, use of such an allocation methodology was inappropriate. *Id.* Commerce's treatment of the discounts as indirect selling expenses was sustained. *Id.*

In *Koyo Seiko,* this court noted that "the rebates in *Smith-Corona* were granted as a straight percentage of sales, regardless of the models sold." 16 CIT at 542, 796 F. Supp. at 1530. In contrast, the post-sale price adjustments at issue in *Koyo Seiko* varied from product to product and sale to sale. *Id.* The court found that under those circumstances, where the adjustments could not be directly linked to specific sales through verified data, the adjustments were properly classified as indirect selling expenses. *Id.* at 542–43, 796 F. Supp. at 1530.

Commerce, the Unions and Zenith argue in this case that Samsung has not proven a direct link between the SYPM rebates and the sales under consideration. They assert that rebates granted during the period of investigation may relate to sales occurring before the period began. Commerce also points to Samsung's accounting practice of recording its rebates on a customer-specific rather than a sales-specific basis.

Samsung admittedly could not tie the rebate amount in the response to specific sales, allocating the amount instead. Def.'s Conf. App., Ex. 1, at 28. ITA therefore agreed to examine rebates given to the same distrib-

utor for the same model in the month following each of the four specific sales it chose to verify. *Id.* The documents found at verification included invoices of sales to dealers, invoices of installment sales from dealers to end users, and lists of transactions showing the price to the dealer, the amount due from the end user and the amount of each monthly installment. *Id.* at 28–29.

According to the report, the SYPM rebate program applied a specific fixed percentage to the total sales to a dealer in a given month. *Id.* at 29. Although Samsung's ledgers listed total monthly rebate amounts for each distributor, they also segregated rebates by product, allowing the examiners to trace rebate amounts for color televisions only. *Id.* at 29, 31. The examiners verified that the rebates were actually paid as claimed. *Id.* at 31.

The verification report thus belies Commerce's claim that its review was limited to data of sales between manufacturers and dealers, as there was ample information concerning sales from dealers to end-users present in the report. *See* 51 Fed. Reg. at 41,377. Like the allocation methodology approved in *Smith-Corona,* Samsung's method seemed to use a fixed rather than a variable percentage. Because product-specific data on rebates were available, Commerce was able to verify amounts relating exclusively to in-scope merchandise. Given the apparent conflict with *Smith-Corona* and the absence of any concerns that have led this court to distinguish *Smith-Corona* in the past, the court now finds that Commerce's treatment of the SYPM rebates as indirect selling expenses is unreasonable.

Commerce also argues that the timing of the rebates, not at issue in *Smith-Corona,* precludes their classification as direct selling expenses. As indicated, Commerce found only an indirect connection to sales under investigation because the rebate could occur at any time subsequent to the sale from the manufacturer to the dealer. Samsung contends that Commerce's treatment of the SYPM rebates is inconsistent with its regular practice of allowing warranty expenses, which are often incurred to repair products sold in prior periods, as direct selling expenses.

Samsung raised a similar argument before this court with relation to bad debt expenses in the case involving the first administrative review, *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 257, 712 F. Supp. 931, 938 (1989) *("Daewoo I"), aff'd in part and rev'd in part on other grounds,* 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied,* 114 S. Ct. 2672 (1994). In *Daewoo I,* ITA asserted that bad debt expenses were indirect unless they were incurred on sales under review and the debt was written off during the period of investigation. *Id.* Samsung countered that ITA's treatment of bad debt expenses and warranty expenses was thus inconsistent. *Id.*

The court agreed, finding no meaningful distinction

> between warranty expenses, which are supposedly 'always direct,' whether or not they are actually incurred with regard to the sales

> under review, and bad debt expenses, which are determined to be either 'direct' or 'indirect' depending on whether they are actually incurred with regard to the specific sales under review.

Id. at 258, 712 F. Supp. at 939,[4] The court explained that the amount of both types of expenses is not generally known at the time of sale because the amount is by its nature contingent upon future events. *Id.* at 258–59, 712 F. Supp. at 939. According to the court, "[a]bsent any reasonable indication as to why the estimation of bad debt expenses based on past experience is any less reliable than the use of past experience for warranty expenses, this distinction between them is not proper." *Id.* at 259, 712 F. Supp. at 940.

This court likewise finds no meaningful distinction between warranties and the credit rebates at issue. Because the amount of the rebates depends on the quantity of merchandise ultimately sold on credit by dealers to end users, it is difficult to calculate the rebate amount at the time of the sales from manufacturer to dealer. ITA was nonetheless able to allocate rebate expenses based on verified, reliable cost data for the purpose of calculating indirect selling expenses. The fact that rebates may be granted within a shorter time period than warranty or bad debt expenses would be incurred merely increases the reliability of the information. The court therefore remands this case to Commerce with directions to treat Samsung's SYPM credit rebates as direct selling expenses.[5]

B. Quantity Discounts or Volume Rebates

Samsung claimed a quantity discount for amounts paid to its home market distributors based on a percentage of the total monetary value of merchandise purchased in each month. The percentage rate increased as the monetary value of total purchases increased. Although the percentage rates were applied to total sales of subject and non-subject merchandise, Samsung segregated the amounts paid on color television receivers for purposes of verification. Def.'s Conf. App., Ex. 1, at 32. ITA verified that these "discounts" were granted on more than twenty percent of Samsung's sales to distributors during eight months of the review period. *Id.*

ITA treated the claimed adjustment for quantity discounts as an indirect selling expense. 51 Fed. Reg. at 41,368. It explained:

> Because the home market sales prices are all individually negotiated—rather than fixed in a price list—the monthly sales value on which the discount is based does not reflect the actual quantity of

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[4] Warranties, unlike bad debt expenses or rebates, are specifically addressed by the regulations. The regulations in effect at the time of the final determination at issue provided that "[e]xamples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in * * * warranties." 19 C.F.R. § 353.15(b) (1986). The court found that the regulations in no way limited adjustments for direct selling expenses to warranties and other listed examples. *Daewoo I*, 13 CIT at 259–60, 712 F. Supp. at 940.

[5] The court does not foreclose the possibility that in the future Commerce may articulate a viable reason to treat rebates differently from warranty expenses and other expenses which occur after the time period at issue, but it has not done so here. Furthermore, the court does not deem it administratively or judicially efficient to reopen the record at this late date in order for the parties to submit new information on whatever factors ITA might deem relevant.

television receivers purchased. In other words, the discount is not a quantity discount, but a volume rebate.

Id.

The statute in effect at the time of the final determination provides for adjustments to FMV if a price differential between USP and FMV "is wholly or partly due to" the difference in the commercial quantities in which the merchandise is sold in the United States and the home market. 19 U.S.C. § 1677b(a)(4)(A) (Supp. III 1985). The implementing regulation directs Commerce to consider home market discounts for quantity sales in making its adjustments. 19 C.F.R. § 353.14(a) (1986).

Special treatment is accorded to manufacturers who grant discounts of at least the same magnitude on 20 percent or more of home market sales for a minimum of six months during the period of investigation. *See id.* § 353.14(b)(1) (1986). If these criteria are fulfilled, ITA deducts the discount price in calculating FMV for all of the manufacturer's sales. *See* Int'l Trade Admin., U.S. Dep't of Comm., *Antidumping Manual, Import Administration* ch. 8, at 43 (July 1993).[6]

Volume rebates, as opposed to quantity discounts, are treated as direct selling expenses if they are directly related to the sales under consideration. *See, e.g., Smith-Corona,* 713 F.2d at 1579–81. A quantity discount is normally offered on a single large quantity sale as an up-front reduction in price. *See Silver Reed America, Inc. v. United States,* 12 CIT 39, 47–48, 679 F. Supp. 12, 19, *clarified, on reh'g,* 12 CIT 250, 683 F. Supp. 1393 (1988). A volume rebate is granted at the end of a period for total sales throughout the period. *See Brother Indus., Ltd. v. United States,* 3 CIT 125, 148–49, 540 F. Supp. 1341, 1363 (1982), *aff'd, Smith-Corona,* 713 F.2d 1568.

Samsung's practice of paying a distributor an after-sale amount representing a certain percentage of monthly sales is more characteristic of a volume rebate than a quantity discount. Therefore, the fact that these rebates were granted on more than 20 percent of Samsung's home market sales over an eight-month period is not determinative. *See* 19 C.F.R. § 353.14(b)(1). The regulations concerning quantity discounts do not apply.

A remaining question is whether Samsung has proven these rebates to be directly related to sales under review. Zenith and the Unions argue that the rebates are indirect selling expenses because they were granted on purchases of all merchandise, not just color television receivers. The verification report notes, however, that Samsung submitted data segregating rebate amounts paid on color televisions from rebates on other products. Def.'s Conf. App., Ex. 1, at 32–33. Commerce verified that these amounts were actually credited to the distributors' accounts receivable. Thus, Samsung has satisfied the *Smith-Corona* requirements that rebates are actually paid, the effective cost to the manufacturer is increased by the amount of the rebate, and any apportionment is

[6] The parties do not dispute the applicability of this methodology to the time period at issue.

based on verified cost data. 713 F.2d at 1580. The court hereby directs ITA on remand to treat the amount of volume rebates actually paid on color television sales as a direct selling expense.[7]

C. Bad Debt Expense

Samsung claimed that its bad debt expenses written off during the period of review were entitled to treatment as direct selling expenses. It seeks remand for a recalculation of the circumstance of sale adjustment to account for bad debt. In the preliminary analysis memorandum, ITA explained:

> We allow only debt which was incurred and written off during the review period. Since the debt was incurred on sales made before the review period, we only allowed a portion of the write-off for sales during the review period. We then determined the resulting adjusted amount to be insignificant and thus disallowed it.

Def.'s Conf. App., Ex. 2, at 1259. Because Samsung made no objection to the preliminary analysis, the issue was not addressed in the final determination.

ITA, Zenith and the Unions assert that Samsung has failed to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d) (1988) ("the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies"); *Ceramica Regiomontana, S.A. v. United States,* 14 CIT 712, 714 (1990) (stating general rule that party aggrieved by agency action must exhaust administrative remedies). In exceptional cases, a reviewing court may consider questions of law not addressed by the agency "where injustice might otherwise result." *Hormel v. Helvering,* 312 U.S. 552, 557 (1941). The reviewing court may exercise its discretion in deciding whether to require exhaustion. *Kokusai Elec. Co. v. United States,* 10 CIT 166, 171–72, 632 F. Supp. 23, 28 (1986) (quoting 4 Kenneth Culp Davis, *Administrative Law Treatise* § 26:7, at 444 (2d ed. 1983)).

Samsung maintains that it falls under three exceptions to the exhaustion requirement: (1) the new issue is purely legal; (2) it would have been futile to have raised the argument at the agency level; (3) there has been an intervening judicial interpretation that would change the agency result. *See Budd Co. v.United States,* 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2(1991) (listing cases).

A claim is not "purely legal" where a remand would require Commerce to perform recalculations, *id.* at 452, 773 F. Supp. at 1555, and likely to consider other evidence in the record or even reopen the record.[8] Therefore, the first exception does not apply.

Samsung is correct that this court may deem it futile to raise an argument at the administrative level where ITA's past precedent reveals a

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[7] For the reasons articulated in note 5, *supra,* this issue is not open for reconsideration.

[8] For example, is historical evidence of bad debt losses relevant?

consistent position on the issue. *Koyo Seiko*, 16 CIT at 544, 796 F. Supp. at 1531. Nevertheless, an administrative agency

> is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) (footnote omitted). After objecting to ITA's treatment of bad debt expenses in the first administrative review, Samsung obtained a remand on the issue in *Daewoo I*, 13 CIT at 257–60, 712 F.Supp. at 938–40. Objecting to ITA's action in the second administrative review at least would have put ITA "on notice of the accumulating risk of * * * reversals" in these multi-issue serial reviews. *L.A. Tucker*, 344 U.S. at 37 In the interests of fairness to the agency, the court finds that the futility exception should not be applied.

The "intervening judicial decision" exception should not apply for similar reasons. Samsung relies on this court's review of the first administrative determination as the intervening judicial decision. *See Daewoo I*, 13 CIT at 257–60, 712 F. Supp. at 938–40. Samsung, however, does not explain why it objected to ITA's treatment of bad debt expenses in the first review, eventually pursuing the issue before this court, but made no objection during the second review proceedings. Samsung's inconsistent behavior does not convince this court that waiver of the exhaustion requirement is justified. Therefore, the court will not consider Samsung's argument as to bad debt expenses.

D. Home Market Warranty Expenses

i. In-House Repair Costs

During the period of investigation, Samsung operated an in-house repair service for merchandise sold under warranty. It also incurred expenses by contracting repairs out to unrelated service centers and by purchasing replacement parts. Commerce requested that Samsung categorize the costs of maintaining the repairs division as either fixed or variable. It did not make a similar request with regard to outside service centers. In its preliminary determination, Commerce treated both fixed and variable costs as indirect selling expenses. *See* Def.'s Mem. Partial Opp'n to Def.-Ints.' Mot. J. Agency R., Pub. App., Ex. 2, at 21.

In its objections to the preliminary results, Samsung complained that its variable costs justified treatment as direct selling expenses. 51 Fed. Reg. at 41,377. Commerce accepted this argument in its final determination. *Id.* Samsung now poses an additional argument before this court, requesting a remand for Commerce to include Samsung's fixed costs of in-house repair in the direct selling expense adjustment.

Samsung has once again failed to exhaust its administrative remedies. Because Samsung requests a remand which may require retrieval and analysis of more data, the issue is not purely legal. *See Budd*, 15 CIT at 452 & n.2, 773 F. Supp. at 1555 & n.2. The fact that ITA classified a portion of in-house warranty costs as direct selling expenses after Sam-

sung's objection to the preliminary results belies Samsung's argument that further objections would have been futile.

Samsung contends that in 1989, three years after the final determination, this court directly addressed the question of whether fixed in-house warranty costs qualify as a directly related selling expense. *See AOC Int'l Inc. v. United States,* 13 CIT 716, 717–20, 721 F. Supp. 314, 315–18 (1989) (finding that each cost component of directly-related expense need not independently meet "direct relationship" test). Whether or not this is true, the court finds it unfair to allow Samsung to raise this issue at this time. Samsung was aware of the issue at the time of administrative proceedings, as is apparent from its objection that the agency did not treat its variable warranty expenses as direct. In the court's view, Samsung made a tactical decision to contest treatment of variable expenses without addressing the issue of fixed expenses. Under these circumstances, waiver is not appropriate. *Budd,* 15 CIT at 453, 773 F. Supp. at 1555 (finding that plaintiff's tactical decision not to raise issue before agency precluded it from raising issue before court). The court therefore declines to address the issue of in-house warranty costs on the ground that administrative remedies were not exhausted.

ii. Replacement Parts

Commerce denied a direct selling expense adjustment for the cost of replacement parts over Samsung's objection, because "Samsung had the information to tie the expense to repairs but did not incorporate that information in its claimed adjustment." 51 Fed. Reg. at 41,377. Samsung instead computed an allocation ratio equalling the number of repairs for each model divided by the total number of repairs, allowing Samsung to allocate total parts costs to each model. Samsung maintains that providing parts information on a sale-by-sale basis would necessitate the unduly burdensome task of reviewing hundreds of thousands of individual repair slips.[9] It contends that an allocation ratio was more appropriate and in accordance with its accounting procedures.

Commerce now requests a remand on this issue to reconsider its classification of parts cost as an indirect selling expense. According to Zenith and the Unions, however, Samsung's allocation methodology provided no rational tie between parts costs and individual models repaired or sold. In *Zenith,* the Federal Circuit upheld an allocation methodology for warranty parts expenses that divided the total parts charges for a model in a single year by the number of units of that model sold during the year. 988 F.2d at 1579, 1584. Samsung's methodology differs only in that it used a ratio to determine total parts charges per model. Given the difficulties in determining a more exact amount and Commerce's acknowledgement of those difficulties, this court grants Commerce's request for a remand on this issue.

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[9] In making its computerized accounting records, Samsung entered the model number for each repair separately from the parts costs information. The computerized accounts thus did not allow Samsung to match parts and model data, because the same part can be used to repair more than one model. Def.-Ints.' Mot. J. Agency R., Conf. App. A, Tab 5, at 18 n.9.

E. Forwarding Charges

Samsung reported its expenses in hiring temporary workers to load color televisions from warehouses onto trucks as home market forwarding charges. Zenith and the Unions protested that these charges resembled fixed labor costs and did not warrant an adjustment for direct selling expenses. In its final determination, Commerce agreed with Zenith and the Unions, stating that "these 'temporary' workers receive wages and other benefits which are more like those received by salaried, rather than temporary employees." 51 Fed. Reg. at 41,367.

Zenith and the Unions continue to assert that Samsung must demonstrate the variable nature of these labor costs for them to qualify as a direct selling expense. Samsung counters that *AOC* abolished the distinction between fixed and variable expenses. Commerce, in an effort to resolve this issue and create a consistent administrative practice, has requested a remand.

This court does not interpret *AOC* as prohibiting reliance on the fixed/variable distinction for all purposes. *AOC* primarily holds that once ITA has found a direct selling expense adjustment to be warranted, it cannot disallow separate components of that expense on the ground that these components are fixed costs. *See* 13 CIT at 719, 721 F. Supp. at 317–18. *AOC* also disapproved of automatically treating fixed costs, such as in-house labor costs for warranty repairs, as indirect if other factors demonstrated a direct relationship to the terms of sale. *See id.* at 718, 721 F. Supp. at 316–17.

Samsung's claim that its temporary workers were hired as needed to transport the color televisions under review is an example of one factor demonstrating a direct relationship to sales. This issue is therefore remanded to ITA for reconsideration of its classification of home market forwarding charges as indirect selling expenses.[10]

VII. *Clerical Errors in ITA's Computer Program:*

Samsung alleges six errors in ITA's computer program that was used to calculate the dumping margin. ITA, Zenith and the Unions agree that errors were committed in calculating the warranty adjustment on PP sales, sales promotion expense, and adjustment for physical differences in merchandise. Therefore, remand is ordered with respect to these three errors.[11]

ITA also requests a remand for the recalculation of home market advertising adjustment figures. Despite the argument of Zenith and the Unions that the adjustment amounts represent reasonable estimates only, this court refuses to regard these clear clerical errors as negligible and not worthy of correction. Remand is granted.

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[10] Perhaps Commerce will use this opportunity to articulate a coherent policy on direct selling expenses, which addresses the concerns noted by the court in *Daewoo I*, *AOC* and this opinion, among others; and while treatment may vary depending on the expense type, the reason for the variance might be explained.

[11] Zenith and the Unions point out what they perceive to be an additional error in Samsung's favor in the calculation of warranty adjustment rates. As Zenith and the Unions did not raise this issue until the filing of their response brief to Samsung's 56.2 motion, this claim is untimely and need not be addressed by ITA on remand.

Samsung further alleges a discrepancy in the amount of home market inland freight computed by ITA and the amount claimed. ITA requests a remand because it is unable to determine whether an error was made. Zenith and the Unions quote a passage from the final determination stating that ITA deducted a portion of the claimed amount for April 1984. 51 Fed. Reg. at 41,367. The program uses a date code that corresponds to May 1, 1984. Def.-Ints.' Conf. App. A, Tab 12; Def.'s Pub. App., Ex. 4. It is unclear whether the values for inland freight are literal monetary figures or codes referring to a separate table of figures. *See* Def.-Ints.' Conf. App. A, Tab 12. The numbers do not correspond to the figures reported in Samsung's questionnaire response. *See id.*, Tab 2, at App. B–2. Therefore, this court grants the requested remand on this issue.

Samsung's claim that ITA used the incorrect date to calculate incentive discounts is withdrawn. ITA requests a remand to consider Samsung's allegation that ITA used allocation rates determined by dividing the incentive discounts in April-June 1984 by sales revenue for the entire review period. It is not clear from the record whether Samsung submitted the correct allocation rates or whether Commerce used these rates. Therefore, remand is granted on this question.[12]

CONCLUSION

This case is hereby remanded to Commerce with instructions to (1) recalculate the VAT adjustment according to its new methodology, (2) apply *PQ Corp.* in determining whether certain sales qualify as PP or ESP transactions, and (3) adjust ESP for commissions and indirect selling expenses. As to Samsung's claimed circumstance of sale adjustments to FMV, Commerce is directed to re-classify (1) SYPM credit rebates and (2) volume rebates as direct selling expenses, and to reconsider the classification of (3) replacement parts and (4) forwarding charges. The clerical errors in ITA's computer program should also be corrected on remand. In all other respects, ITA'S determination in the second administrative review of color televisions from Korea is sustained. Commerce is directed to submit its remand results within 90 days. Any comments thereon are due within twenty days thereafter.

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[12] As Samsung has withdrawn its claim regarding imputed inventory carrying costs, this court will not address it except to state that the issue was previously decided in *Daewoo I*, 13 CIT at 274–75, 712 F. Supp. at 950–51.

(Slip Op. 94–145)

ENCON INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND LASKO METAL PRODUCTS, INC., DEFENDANT-INTERVENOR

Court No. 94–03–00189

[Dismissed.]

(Dated September 19, 1994)

Ross & Hardies (Steven P. Kersner, Jeffrey S. Neeley and *Roger Banks)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeffrey N. Telep), Stacey J. Ettinger,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant United States.

Lyn N. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, United States International Trade Commission *(Judith N. Czako)* for defendant International Trade Commission.

McKenna & Cuneo (Peter Buck Feller and *Lawrence J. Bogard)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on separate motions to dismiss filed by the international Trade Commission ("ITC") and the United States ("Commerce"). In its complaint, Plaintiff, Encon Industries, Inc., challenges the amended final determination entitled *Ceiling Fans from the People's Republic of China,* 59 Fed. Reg. 9956 (Dep't Comm. Mar. 2, 1994) (amended final determ. of sales at less than fair value ("LTFV")). Commerce alleges that Encon lacks standing to file suit, as it did not participate in the proceedings leading to the Commerce determination which it challenges. ITC contends that the time for challenging its injury determination, which underlies the antidumping duty order, has expired and, further, that Encon's suit is barred by *res judicata* principles. Thus, both parties allege a lack of jurisdiction. The court will first address the motion of the United States.

Encon filed a notice of appearance in the antidumping investigation at issue, but never submitted factual information to Commerce or made oral or written comments during the proceedings. It now wishes to challenge the manner in which Commerce calculated the "all others" duty rate, which applies to Encon's entries.

The briefs of the parties focus on whether Encon satisfied the statutory requirements that it be an interested party and a party to the proceedings before Commerce. 19 U.S.C. § 1516a(a)(2)(A), (d) (1988); 28 U.S.C. § 2631(c) (1988). The court has found one case which held that a notice of appearance is sufficient to impose party to the proceeding status upon the filer. *Zenith Radio Corp. v. United States,* 5 CIT 155, 157 (1983). *But cf. American Grape Growers v. United States,* 9 CIT 103, 105–06, 604 F. Supp. 1245, 1249 (1985) (party granted standing listed as co-petitioner in post-conference brief); *Kokusai Elec. Co. v. United*

States, 9 CIT 336, 339, 613 F. Supp. 1249, 1252 (1985) (party granted standing participated in public hearing); *RSI (India) Pvt., Ltd. v. United States,* 12 CIT 84, 87, 678 F. Supp. 304, 307 (1988) (party granted standing filed comments).

The court is inclined to view the participation requirement as intending meaningful participation, that is, action which would put Commerce on notice of a party's concerns. *See American Grape Growers,* 9 CIT at 105–06, 604 F. Supp. at 1249 (party must take opportunity to further its interests at administrative level). Nonetheless, the court need not reach that conclusion in this case. Perhaps the issue would rarely need to be reached, because there is also the statutory requirement that parties exhaust administrative remedies, where appropriate. 28 U.S.C. § 2637(d) (1988). Here Encon argues that exhaustion is not appropriate because the well-known futility exception to the doctrine applies. *See, e.g., Budd Co. v. United States,* 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). The practice challenged by Encon, however, is simply that, a practice. While the practice may be long-standing, Commerce, for good reason, may change it at any time. Thus, *Rhone Poulenc S.A. v. United States,* 7 CIT 133, 135–36, 583 F. Supp. 607, 610–11 (1984) (involving application of regulation), does not apply. The exhaustion requirement serves important purposes, *see Budd Co.,* 15 CIT at 453, 773 F. Supp. at 1555–56, and should not be lightly regarded. If Encon had a strong argument to raise as to Commerce's "all others" rate calculation methodology, submitting it to Commerce would cause Commerce to address the argument and thus prepare the issue for judicial review.

Accordingly, the court declines to assert jurisdiction over Encon's challenge to Commerce's determination because of failure to exhaust administrative remedies, whether or not Encon has technically satisfied the statutory standing requirements. The motion to dismiss of the United States is granted. The court now turns to ITC's motion to dismiss.

There is no issue that Encon failed to participate in the ITC proceedings underlying the antidumping duty order at issue. In fact, it made several challenges and pursued them in litigation before this court. *See Encon Indus. v. United States,* 16 CIT 840 (1992) *("Encon I").* Rather, ITC asserts that Encon's suit is barred, because it failed to challenge ITC's determination within the time period allowed by the governing statute, 19 U.S.C. § 1516a(a)(2)(A)-(B)(i),[1] and by *res judicata* principles.

According to ITC, Encon was required to bring its suit within thirty days of publication of the original antidumping duty order, *Oscillating Fans and Ceiling Fans from the People's Republic of China,* 56 Fed. Reg. 64,240 (Dec. 9, 1991) (final determ. of LTFV sales & antidumping duty

[1] The governing statute provides that within thirty days after date of publication of an antidumping duty order based upon a final affirmative determination by Commerce and by ITC, "an interested party who is a party to the proceeding * * * may commence an action in the [CIT] * * * contesting any factual findings or legal conclusions upon which the determination is based." 19 U.S.C. § 1516a(a)(2)(A)-(B)(i).

order). ITC argues that the March 2, 1994 amended antidumping duty order upon which Encon relies to recommence the limitations period is not an antidumping order, for purposes of the statute of limitations. *See NTN Bearing Corp. v. United States,* 12 CIT 381, 383–84, 684 F. Supp. 1093, 1096 (1988) (amended dumping order did not modify ITC determination, thus, no basis for new action). The court, however, need not decide this issue because the court finds ITC's other basis for dismissal persuasive. That is, Encon's claim was part and parcel of its original challenge before this court, and Encon could have litigated the issue it raises here in the earlier litigation. Thus, *Encon I* precludes Encon's action in the present case.

Encon argues that it could not have brought its claim during the original litigation. Encon alleges that its claim arose only after publication of the amended order resulting in the exclusion of one company from the antidumping order and consequently elimination of its volume of imports from the volumes previously relied upon by ITC. Encon argues that before that time "there were no facts or evidence in existence that could have supported this claim." Pl.'s Resp. Br. to ITC's Rule 12(b)(1) Mot., at 7. This of course ignores the fact that parties can and do challenge ITC's actions on the basis of errors in the information furnished to it by Commerce. *See, e.g., Borlem S.A. v. United States,* 13 CIT 535, 718 F. Supp. 41 (1989). It may be that in such cases the ITC litigation must be stayed in order for the plaintiff to have the maximum chance of success, but such stays have been granted. *See, e.g., Hyundai Elecs. Indus. v. United States,* Ct. No. 93–06–00319 (complaint alleging volume error (July 8, 1993); stay order issued pending resolution of other action (Sept. 13, 1993)).

Thus, contrary to the assertions of Encon, the court does not recognize Encon's claim as different from the claims that were raised or should have been raised in *Encon I.* There were procedures available to plaintiff to preserve its claim.[2] The issues surrounding the exclusion of the company at issue were not unknown to those actively participating in the relevant administrative proceedings. Also, there were no formal or informal barriers to the assertion of this particular aspect of Encon's challenge to the ITC determination at issue in *Encon I.* Accordingly, Encon's arguments based on its views of *res judicata* doctrine and on *Young Engineers, Inc. v. ITC,* 721 F.2d 1305 (Fed. Cir. 1983), and *Foster v. Hallco Mfg. Co.,* 947 F.2d 469 (Fed. Cir. 1991), are without merit.

It is hereby ordered that this action is dismissed.

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[2] There are also statutory avenues of prospective relief available to plaintiff. *See* 19 U.S.C. § 1675(b)(1) (1988) (changed circumstances review).

(Slip Op. 94–146)

ZENITH ELECTRONICS CORP., ET AL., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT

Consolidated Court No. 88–07–00488

[ITA determination remanded.]

(Dated September 19, 1994)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for plaintiff Zenith Electronics Corporation.

Collier, Shannon, Rill & Scott (Paul D. Cullen, Jeffrey S. Beckington, Mary T. Staley, David C. Smith, Jr. and *Gail S. Usher)* for plaintiff-intervenors Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO).

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Priya Alagiri,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Sukhan Kim, Warren E. Connelly. P.C. and *Margaret L.H. Png)* for defendant-intervenors Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on three motions pursuant to USCIT Rule 56.2 for judgment upon the agency record. The motions have been brought by (1) the Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO) (collectively "the Unions"), (2) Zenith Electronics Corporation, and (3) Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively "Samsung"). The court has consolidated these separate challenges to the determination of the International Trade Administration of the United States Department of Commerce ("ITA" or "Commerce") in *Color Television Receivers from Korea,* 53 Fed. Reg. 24,975 (Dep't Comm. 1988) (third final admin. review).

STANDARD OF REVIEW

As this consolidated action constitutes a challenge to the final determination of an administrative review, the applicable standard of review is whether the final determination is supported by substantial evidence on the record and is otherwise in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

I. *Adjustment for Value-added Taxes:*

In its final determination, Commerce added the amount of home market value-added taxes ("VAT") forgiven by reason of export to United

States price ("USP") in accordance with 19 U.S.C. § 1677a(d)(1)(C) (1988). 53 Fed. Reg. at 24,976. To offset the VAT adjustment, Commerce made circumstance of sale ("COS") adjustments to foreign market value ("FMV"). *Id.*

Zenith and the Unions argue that the Federal Circuit's decision in *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993), forbids a "neutralizing" COS adjustment.[1] *See also Avesta Sheffield, Inc. v. United States*, 838 F. Supp. 608, 614 (Ct. Int'l Trade 1993) (remanding for recalculation of FMV with no COS adjustment). Commerce and Samsung agree.

Pursuant to its new methodology, Commerce applies the home market tax rate to the exported merchandise at the same point in the U.S. chain of commerce at which the foreign tax was applied to home market sales. *See Ferrosilicon from Brazil*, 59 Fed. Reg. 732, 733 (Dep't Comm. 1994) (final determ. of sales at less than fair value ("LTFV")). Commerce then "adjust[s] the USP tax adjustment and the amount of tax included in FMV" to account for expenses deducted in calculating FMV and USP. *Id.* This methodology was upheld in *Torrington Co. v. United States*, 854 F. Supp. 446, 448–49 (Ct. Int'l Trade 1994). Although Samsung protests the application of this new methodology on the ground that the Federal Circuit has not yet upheld it, the court sees no point in revisiting the issue. The court accepts Commerce's acknowledgement of its error and remands the determination for Commerce to account for VAT in accordance with its new methodology.[2]

II. *Adjustments for Antidumping Duties:*

Zenith contends that antidumping duties actually paid or to be paid should be deducted from USP pursuant to 19 U.S.C. § 1677a(d)(2)(A) and § 1677a(e)(2) (1988).[3] Zenith also cites to Commerce's reimbursement regulation, in effect at the time, which provides for the deduction

> of any antidumping duties which are, or will be, paid by the manufacturer, producer, seller, or exporter, or which are, or will be, refunded to the importer by the manufacturer * * * either directly or indirectly.

19 C.F.R. § 353.55(a) (1988). It argues that payment of antidumping duties by a related importer is equivalent to payment by the producer directly on behalf of the importer.

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[1] The Federal Circuit in *Zenith* stated,

> Congress specifically rejected accounting for foreign commodity taxes in FMV, opting instead to adjust USP. Therefore, the trial court correctly directed Commerce to recalculate the dumping margins and duties * * * without adjustments to FMV.

988 F.2d at 1581.

[2] The Unions withdrew their claim regarding ITA's failure to measure the amount of tax passed through to home market consumers after the Supreme Court declined to review *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1517 (Fed. Cir. 1993), *cert. denied*, 114 5. Ct. 2672 (1994).

[3] Section 1677a(d)(2)(A) provides that USP shall be reduced by

> the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States * * *

19 U.S.C. § 1677a(d)(2)(A). Section 1677a(e)(2) provides that the exporter's sales price ("ESP"), a type of USP, shall be reduced by the amount of "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." *Id.* § 1677a(e)(2).

Commerce and Samsung raise the defenses of failure to exhaust administrative remedies and failure to plead the issue in the complaint. In response to the preliminary results, Zenith commented that ITA "should reduce the USP by the amount of estimated antidumping duties." 53 Fed. Reg. at 24,978 (emphasis added). ITA disagreed. *Id.* Zenith now asserts that adjustments should be made for *actual* antidumping duties.

This court has differentiated between the issues of whether estimated or actual antidumping duties should be deducted from USP. In *PQ Corp. v. United States,* 11 CIT 53, 652 F. Supp. 724 (1987), the court stated,

> [i]t was not improper for ITA to not make any adjustments * * * for *deposits* of estimated antidumping duties * * *. Because ITA found no margin, there were no *actual* duties to deduct. The determination upon remand, however, may result in a finding of dumping, in which case the separate issue of whether actual duties should be deducted in calculating final margins may arise.

Id. at 68, 652 F. Supp. at 737 (footnote omitted). Therefore, by addressing the issue of only estimated duties at the administrative level, Zenith did not exhaust its remedies as to a deduction for actual duties.[4]

Zenith also failed to plead the issue properly in its complaint. *See* USCIT Rule 8(a) ("A pleading * * * shall contain * * * a short and plain statement of the claim showing that the pleader is entitled to relief"). The complaint alleges that ITA erred by failing to account for estimated antidumping duties. Compl. ¶ 5(q). Zenith's motion to amend its complaint to add a claim for the deduction of actual antidumping duties was denied. *Zenith Elecs. Corn. v. United States,* Consol. Ct. No. 88–07–00488 (Ct. Int'l Trade July 22, 1994) (order denying Zenith's motion to amend complaint). Because Zenith neither exhausted its administrative remedies nor raised the issue properly before this court, the court will not reach the merits of Zenith's argument.

III. *Treatment of Certain Sales as Purchase Price or Exporter's Sales Price Transactions:*

The Unions contend that Commerce presumed that certain of Samsung's sales, negotiated prior to importation, were purchase price ("PP") transactions. According to the Unions, Commerce failed to require proof that the sales were PP transact ions and ignored evidence showing that the sales were clearly not PP transactions.

The statute defines USP as "the purchase price ["PP"), or the exporter's sales price ["ESP"), of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a) (1988). The PP is "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for

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[4] The court does not accept Zenith's position that it falls under two exceptions to the exhaustion requirement—where the new argument is purely legal and where it would have been futile to raise the issue before the agency. *See Budd Co. v. United States,* 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). Because Zenith requests a remand which will require new factual findings, the issue is not purely legal. *See id.* at 452, 773 F. Supp. at 1555. Zenith's futility argument rests on the results in one administrative determination, which does not suffice to show Commerce's immovable stance on the issue. *See Koyo Seiko Co. v. United States,* 16 CIT 539, 544, 796 F. Supp. 1526, 1531 (1992).

exportation." *Id.* § 1677a(b) (1988). The ESP is "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter." *Id.* § 1677a(c) (1988).

Prior to this court's decision in *PQ Corp.*, Commerce's consistent practice was to delineate between PP transact ions and ESP sales based upon when they were completed. 11 CIT at 60 & n.8, 652 F. Supp. at 731 & n.8. In *PQ Corp.*, the court held that "[t]he mere fact that a sale was made prior to importation does not provide a sufficient basis for applying PP rather than ESP. * * * Thus, where a sale is made to an unrelated party prior to importation, the determination of whether PP or ESP applies must be based upon additional circumstances." *Id.* at 60, 652 F. Supp at 731.

In response to the holding of PQ Corp., Commerce developed the following three-part test:

> [(1)] the manufacturer must ship the merchandise directly to the unrelated buyer, without introducing it into the related selling agent's inventory. [(2)] This procedure must be the customary sales channel between the parties. [(3)] The related selling agent located in the United States must act only as a processor of documentation and a communication link with the unrelated buyer.

Borusan Holding A.S. v. United States, 16 CIT 278, 281 (1992) (footnote omitted). In the administrative proceedings at issue, Commerce applied this test to Samsung's sales,[5] finding that Samsung's indirect purchase price customers "are a distinct and separate group from its ESP customers." 53 Fed. Reg. at 24,980–81. Commerce accepted Samsung's statement for the record that Samsung does not place merchandise for ESP customers in its U.S. subsidiary's inventory and that direct shipments are the customary channel of trade for these customers. *Id.* at 24,981. Commerce found no evidence that the U.S. subsidiary "functions as anything more than an agent for these sales." *Id.*

The Unions assert that a PP analysis is appropriate only where the U.S. subsidiary "at no time maintained an inventory from which sales were made." *Frozen Concentrated Orange Juice from Brazil*, 52 Fed. Reg. 8324, 8326 (Dep't Comm. 1987) (final determ. of LTFV sales) *("FCOJ")*. They reason that Samsung does not meet this test because it reported ESP sales and therefore the subsidiary must have kept an inventory from which sales were made. The Unions' reasoning ignores the fact that Commerce found both PP and ESP transactions to have occurred in *FCOJ*. *Id.* The only way to reconcile the language in *FCOJ* with the result is to interpret the test as referring to an inventory from which *PP* sales were made.

Moreover, this court has found that merchandise has not been introduced into inventory even where the U.S. subsidiary temporarily

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[5] The final determination refers to the test set forth in the preliminary results. 53 Fed. Reg. at 24,980. The preliminary results apply the test approved in *Borusan. Color Television Receivers from Korea*, 52 Fed. Reg. 17,617, 17,618 (Dep't Comm. 1987) (prelim. admin. review).

held the merchandise in a warehouse before shipping it to the end purchaser. *See E.I. DuPont de Nemours & Co. v. United States,* 841 F. Supp. 1237, 1249–50 n.4, 1250 (Ct. Int'l Trade 1993); *Outokumpu Copper Rolled Prods. AB v. United States,* 829 F. Supp. 1371, 1379–80 (Ct. Int'l Trade 1993).

In Samsung's indirect purchase price ("IPP") sales, the manufacturer ships the merchandise to the subsidiary who, in turn, ships the merchandise from the port to the customer. Def.-Ints.' Mem. Supp. Mot. J. Agency R., Conf. App. B, Tab 2, at 13. Under the terms of sale, the merchandise is delivered or sent f.o.b. (freight-on-board) the applicable U.S. port. Joint Opp'n of Pl.-Ints. and Pl. to Def.-Ints.' Rule 56.2 Mot., Pub. R. App., Tab 2, at 2. In contrast, the ESP merchandise is delivered or sent f.o.b. the subsidiary's warehouse under a FIFO (first in, first out) inventory system. *Id.* at 1. These terms of sale constitute sufficient evidence for Commerce to conclude that Samsung's IPP merchandise was not introduced into its subsidiary's inventory, even though the subsidiary may have taken temporary possession of it at the port of entry.

The evidence also supports ITA's finding that direct shipments were a customary channel of sale for IPP sales. Samsung stated for the record that its IPP sales, which are sales of specific private label models, are not introduced into the subsidiary's inventory. Def.'s Partial Opp'n to Pl.-Ints.' Rule 56.2 Not., Pub. App., at 19. Furthermore, the fact that the private label model shipments "were not warehoused * * * indicates that direct shipments * * * to U.S. customers were a customary commercial channel of sales." *DuPont,* 841 F. Supp. at 1250.

The Unions request the court to find that Samsung's subsidiary did not function solely as a processor of documentation and a communication link because it invoiced customers, collected payments, acted as importer of record, paid customs duties, and may have taken title to the goods when they arrived in the United States. The record shows only that Samsung's subsidiary took purchase orders and invoiced the customers. Def.-Ints.' Conf. App. B, Tab 2, at 13.[6]

In *DuPont,* customers sent purchase orders directly to the U.S. subsidiary, and the subsidiary sent invoices directly to the customers. 841 F. Supp. at 1249. The subsidiary also acted as importer of record and received payment from the customers. *Id.* Nevertheless, the court deemed the subsidiary to be a mere processor of documentation and a communication link. *Id.* at 1250. In *Outokumpu,* where the subsidiary took title to the exported merchandise and paid customs duties, the court nevertheless found that the sales were properly classified as PP transactions. 829 F. Supp. at 1379–80. Therefore, even if the court were to accept the Unions' allegations as true, Commerce's classification of Samsung's IPP sales as PP transactions is supported by substantial evidence on the record.

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[6] Contrary to the Unions' assertion, the court does not find ITA's investigation deficient on this issue.

IV. *Offset of Imputed Credit Expense Formula:*

In the third administrative review, ITA made a COS adjustment to account for Samsung's imputed credit expenses based on the average duration of accounts receivable. *See* 53 Fed. Reg. at 24,982. The Unions requested Commerce to offset the average duration of accounts receivable by the average duration of accounts payable.[7] *Id.* Commerce denied the Unions' request "for the reasons stated in our final results of the previous review." *Id.* In the previous review, Commerce stated that the Unions' suggested methodology "would require us to adjust for factors relating to cost of production, which are unrelated to the *sales* at issue." *Color Televisions Receivers from Korea,* 51 Fed. Reg. 41,365, 41,366 (Dep't Comm. 1986) (second final admin. results).[8]

In *Federal-Mogul Corp. v. United States,* 839 F. Supp. 881 (Ct. Int'l Trade 1993), the ITA determination under review did not calculate an offset for the delay in payment of home market selling expenses, *i.e.*, the duration of accounts payable. *Id.* at 884–85. The court sustained ITA's determination, holding that ITA "is not required to factor in the effects of delayed payment of home market selling expenses on these COS adjustments." *Id.* at 886. For this reason, and for the reasons stated in *Independent Radionic Workers v. United States,* Slip Op. 94–144, at 10–11 (September 16, 1994), the court sustains ITA's decision not to account for the average duration of accounts payable.

V. *Indirect Versus Direct Selling Expenses:*

A. Credit Sale Rebates

Samsung granted rebates to its home market distributors who sold to consumers on credit pursuant to a rebate program known as Shin Yong Pan Mae ("SYPM"). To calculate a per unit amount of the rebate, Samsung divided the total amount of rebates paid on the subject merchandise by the total amount of sales revenue for the subject merchandise. Def.-Ints.' Conf. App. B, Tab 2, at App. B–6. Samsung then multiplied the resulting percentage by the price of each individual home market sale under investigation.

In the first and second reviews, ITA denied a direct selling adjustment for the SYPM rebates on the ground that the timing of the post-sale rebates did not allow ITA to tie the rebates specifically to sales during the review period. *Color Televisions Receivers from Korea,* 51 Fed. Reg. at 41,377; *Color Television Receivers from Korea,* 49 Fed. Reg. 50,420,

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[7] The Unions have withdrawn their additional claim that Commerce erred in combining the commission offset with the ESP offset.

[8] Commerce further explained its reasoning in its brief before the court:

> [B]y allowing the customer a period of time to pay, the seller effectively reduces the sales price of the merchandise because of the time value of money. * * * To the extent that a manufacturer can delay paying its suppliers, the cost of materials is reduced by the time value of money, resulting in a saving in the cost of production. Since accounts payable are, thus, production costs, they cannot result in a circumstance-of-sale adjustment.

Def.'s Partial Opp'n to Pl.-Ints.' Rule 56.2 Not., at 18.

50,427 (Dep't Comm. 1984) (first final admin. results). In contrast, the third administrative review results stated,

> the SYPM rebate program is not allowable as a circumstance of sale adjustment because Samsung cannot identify the rebate on a model specific basis. It is important that Samsung [sic] be able to identify the expense model-by-model because CTVs [color televisions] with different screen sizes will have differing credit experiences * * *. It is not adequate that Samsung identify the rebate expense distributor-by-distributor because we do not calculate the FMV on that basis.

53 Fed. Reg. at 24,986. Although ITA agrees that a remand is necessary to redress any inconsistency in the different reviews, Zenith and the Unions contest Samsung's claim that a model-specific allocation is not necessary.

The Federal Circuit has concluded that the use of an appropriate allocation methodology "does not deprive * * * rebates of their direct relationship to the sales under consideration." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).[9] The methodologies deemed appropriate by the Federal Circuit include not only "apportioning the expense among the various models sold and dividing by the quantity of each model sold," but also dividing the total amount of the rebate by the total sales quantity of subject merchandise. *Id.* In essence, Samsung applied the latter methodology, although it divided by total sales revenue rather than total sales quantity. Therefore, the SYPM rebates should be treated as direct selling expenses unless *Smith-Corona* is found not to apply.

This court has distinguished *Smith-Corona* in circumstances where (1) the manufacturer's actual cost data does not establish a direct link between a rebate and the sale of merchandise within the scope of investigation and (2) rebates were not assessed as a fixed percentage of sales. *NSK Ltd. v. United States*, 843 F. Supp. 1503, 1505 (Ct. Int'l Trade 1994); *Koyo Seiko Co. v. United States*, 16 CIT 539, 542–43, 796 F. Supp. 1526, 1530 (1992).

In *NSK*, the court found that unless a manufacturer offers the same rebates on in-scope merchandise as on out-of-scope merchandise, allocating rebates over total sales per customer is inappropriate. 843 F. Supp. at 1505. The allocation formula used by Samsung divided CTV rebates by CTV sales. Def.-Ints.' Conf. App. B, Tab 2, at App. B- 6. Thus, it is product-specific rather than customer-specific and it establishes a direct link between the rebates and the sale of in-scope merchandise.

In *Koyo Seiko*, this court differentiated between rebates "granted as a straight percentage of sales, regardless of the models sold," which *Smith-Corona* considered to be direct selling expenses, and rebates that varied from product to product. *Koyo Seiko*, 16 CIT at 542–43, 796 F. Supp. at 1530. ITA attempts to characterize the SYPM rebates as

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[9] *See Independent Radionic Workers*, Slip Op. 94–144, at 14–16, for a more detailed discussion of the law on circumstance of sale adjustments and direct selling expenses in this context.

varying according to product because "CTVs with different screen sizes will have differing credit experiences." 53 Fed. Reg. at 24,986. The operative question, however, is not whether different models have differing credit experiences but whether the rebate percentage rate varies from model to model. Samsung has supported its position that rebates were granted at a fixed percentage rate. Def.-Ints.' Conf. App. B, Tab 2, at App. B- 6. Therefore, the court grants the request of Commerce and Samsung for remand, but further instructs ITA to treat the SYPM rebates as direct selling expenses.[10]

B. Bad Debt Expense

In its brief before the court, Samsung claims that its bad debt expenses incurred during the period of review are entitled to treatment as direct selling expenses. This claim does not appear in Samsung's original complaint. On July 22, 1994, the court denied Samsung's motion to amend its complaint to add the allegation that ITA erred in its treatment of bad debt expenses. *Zenith Elecs. Corp. v. United States*, Consol. Court No. 88–07–00488 (Ct. Int'l Trade July 22, 1994) (order denying Samsung's motion to amend complaint). Samsung is thus precluded from litigating the issue before this court. *See* USCIT Rule 8(a) (requiring pleadings to make short and plain statement of claim).[11]

C. Home Market Warranty Expenses

i. In-House Repair Costs

Samsung's warranty services in the home market consisted of in-house repairs and repairs by outside service centers. Samsung argues before this court that ITA erred in treating the fixed components of in-house repair costs as indirect selling expenses. Samsung's questionnaire response mentions only that Samsung believes its variable warranty costs to be direct selling expenses. Def.'s Partial Opp'n to Def.-Ints.' Rule 56.2 Mot., Conf. App., Ex. 1, at 32. Its comments on the preliminary review results are confined to fees to outside service agents. *Id.* Ex. 4, at 6–7. Therefore, Commerce did not address this issue in the final results. *See* 53 Fed. Reg. at 24,977.

Samsung has failed to exhaust its administrative remedies, and no exceptions to the exhaustion requirement apply.[12] Because a remand would necessarily involve new factual analysis, the issue is not purely legal. *Budd Co. v. United States*, 15 CIT 446, 452 & n.2, 773 F. Supp. 1549, 1555 & n.2 (1991). Moreover, the application of the futility and intervening judicial decision exceptions in this situation would unduly

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[10] In its review of the second final administrative results, the court rejected ITA's rationale for classifying the SYPM rebates as indirect selling expenses based on timing considerations. *Independent Radionic Workers*, Slip Op. 94–144, at 18–20. Thus, no purpose would be served in directing ITA to adhere to its practice in the first and second reviews. As the issue was adjudicated in *Independent Radionic Workers*, the court declines to allow ITA to search for the third reason to reject the adjustment in these particular proceedings.

[11] Samsung also failed to exhaust its administrative remedies on this point. See discussion in *Independent Radionic Workers*, Slip-Op. 94–144, at 23–26.

[12] Three exceptions to the exhaustion requirement are: (1) the new issue is purely legal; (2) it would have been futile to have raised the argument at the agency level; (3) there has been an intervening judicial interpretation that would change the agency result. *Budd Co. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991) (listing cases).

prejudice the other parties to this action. *See Independent Radionic Workers,* Slip Op. 94–144, at 26–27 (in-house repair costs).

Samsung made the apparent tactical decision to object to ITA's treatment of variable expenses and fees to outside service agents without raising the issue of fixed expenses. Under these circumstances, waiver is not appropriate. *See Budd,* 15 CIT at 453, 773 F. Supp. at 1555–56 (finding that plaintiff's tactical decision not to raise issue before agency precluded it from raising issue before court). The court thus will not decide the merits of Samsung's claim regarding in-house repair costs.

ii. Fees to Outside Service Agents

In the final determination, Commerce did not allow Samsung's fees to outside service agents as direct warranty expenses. 53 Fed. Reg. at 24,977. It explained,

> [i]n our deficiency letter to Samsung, we requested that they separately identify that portion of the agents' salaries devoted to repair work. However, Samsung did not comply with our request. It stated that Samsung [sic] only pays warranty fees from warranty services provided by those agents.

Id. Samsung contends that the answer it provided to ITA's request was a complete one—although some of its outside service agents were also distributors, the entire portion of the agents' salaries reported by Samsung was attributable to repair services. According to Samsung, there were no non-warranty expenses to identify separately.

In *Olympic Adhesives Inc. v. United States,* 899 F.2d 1565 (Fed. Cir. 1990), the Federal Circuit stated, "a 'No' answer is not a refusal to provide data. If there is no data, 'No' is a complete answer." *Id.* at 1573. Although *Olympic Adhesives* resolved a challenge to the application of best information available ("BIA"), *see* 19 U.S.C. § 1677e(b), (c) (1988), its logic is equally persuasive here.

Commerce classified certain expenses as indirect because Samsung allegedly did not prove that they were warranty expenses entitled to direct treatment. If the entire reported value constituted warranty-related expenses, Samsung cannot be blamed for failure to segregate warranty and non-warranty expenses. Upon review of Samsung's arguments and the administrative record, Commerce has requested a remand to reconsider this issue. The court hereby grants Commerce's request.

VI. *Use of BIA to Determine Freight Allowance Discounts:*

Samsung granted freight allowance discounts to its ESP customers who purchased merchandise by the container load or who picked up orders exceeding a certain dollar amount from the subsidiary's warehouse. In response to ITA's request for information on non-quantity discounts, Samsung submitted an allocated per-unit discount amount.

ITA's final determination substituted BIA for Samsung's reported freight allowance expenses because Samsung failed to report them on a per-sale or per-customer basis. 53 Fed. Reg. at 24,985. The determination found no reasonable explanation for this failure, because Sam-

sung's questionnaire response indicated that its U.S. subsidiary had sale-specific information. *Id.*

Samsung maintains that after it submitted the allocated amount, Commerce made no further requests for information. It stresses that the statute directs the use of BIA "whenever a party * * * refuses or is unable to produce *information requested.*" 19 U.S.C. § 1677e(c) (emphasis added). The Federal Circuit's opinion in *Olympic Adhesives* provides that "the propriety of the ITA's invocation of the 'best information' rule depends on (1) whether [the party's] responses to information requests * * * were deficient * * *, and (2) whether the ITA gave [the party] warning and an opportunity to correct any such deficiencies." 899 F.2d at 1572–73.

ITA requests a remand to determine whether its use of BIA in this situation complied with *Olympic Adhesives*. Zenith and the Unions oppose a remand, citing *Koyo Seiko*, 16 CIT at 542–43, 796 F. Supp. at 1530, for the proposition that expenses must be reported on a product-specific basis to qualify as direct. The issue before the court, however, is not whether Samsung should have reported freight allowance discounts on a product-specific basis. The question is whether Samsung was ever given the opportunity to make such a submission. Therefore, this court grants the request of Commerce and Samsung for a remand to reconsider the use of BIA.

VII. *Adjustment for Free Parts and Merchandise:*

Samsung's supplemental questionnaire response indicates that Samsung adjusted the total value of direct purchase price transactions to reflect free spare parts and CTVs. Def.-Ints.' Conf. App. B, Tab 8, at 107 n.2. The response lists the raw value, while the computer tape uses the adjusted value. *Id.*

Zenith's comments on the preliminary results allege that Samsung's adjusted figures impermissibly increased the total value of direct purchase price transactions, potentially masking dumping margins. Joint Opp'n of Pl.-Ints. and Pl. to Def.-Ints.' Rule 56.2 Mot., Conf. R. App., Tab 5, at 19–20. Samsung replied that the same arguments had been rejected by Commerce in the previous administrative review. *Id.* Tab 7, at 9.

In the previous administrative review, Samsung submitted a computer tape that adjusted the reported quantities for certain sales to account for free parts and CTVs, effectively revising the gross unit price downward. *Color Televisions Receivers from Korea*, 51 Fed. Reg. at 41,368. ITA accepted this method. *Id.* In the final results at issue here, Commerce reached a different conclusion:

> in the final results of the previous review, we accepted Samsung's downward adjustment of gross unit price to account for the parts and televisions * * *. We have examined the computer tape data and have concluded that Samsung has upwardly adjusted its PP sales value and quantities. For the reasons stated in our previous review,

> we have stripped out the additional sales values and quantity sold, using Samsung's response as best information available.

53 Fed. Reg. at 24,978 (citation omitted).

On the day before the final results in this case were published in the Federal Register, Samsung wrote a letter to Commerce informing it that Samsung had made the same adjustment in the current review as in the previous review and declaring that Commerce had never asked for the particulars of the adjustment methodology. Joint Opp'n of Pl.-Ints. and Pl., Conf. R. App., Tab 9. Approximately two weeks later, Samsung sent a more detailed explanation to ITA with accompanying invoices and computer printouts. Def.-Ints.' Conf. App. B, Tab 5.[13]

Zenith and the Unions argue that Samsung, as the respondent, has the burden of making timely explanations to ensure that ITA understands and correctly uses the submitted data. *See Neuweg Fertigung GmbH v. United States,* 16 CIT 724, 728, 797 F. Supp. 1020, 1023–24 (1992). While this is true, it is also incumbent on Commerce to make determinations that are supported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(2).

The only record evidence cited in support of Commerce's determination on this issue is five pages of computer data relating to Samsung's direct purchase price sales. Joint Opp'n of pl.-Ints. and Pl., Conf. R. App., Tab 6. According to Zenith and the Unions, these pages demonstrate an overstatement in sales. There are no cumulative totals and the data are in many instances completely illegible. After review of this record, ITA now requests a remand to consider whether Samsung's computer program properly adjusted for free televisions and parts. Given the weak nature of the evidence in support of Commerce's determination on this point, the court agrees that a remand is necessary.[14]

CONCLUSION

This case is hereby remanded to Commerce with instructions to (1) recalculate the VAT adjustment according to its new methodology (2) re-classify the SYPM credit rebates as direct selling expenses, (3) reconsider warranty-related fees to outside service agents as direct selling expenses, (4) reconsider the use of BIA to determine freight allowance discounts, and (5) reconsider the adjustment for free merchandise and parts. In all other respects, ITA's determination in the third administrative review of color televisions from Korea is sustained. Commerce is directed to submit its remand results within 90 days. Any comments thereon are due within twenty days thereafter. Commerce may respond in 12 days.

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[13] A comparison with the invoices shows that the computer printouts adjusted the quantity of CTVs sold by adding the number of free televisions, thereby decreasing the per-unit price, and sales price was decreased by the value of free parts.

[14] Samsung has withdrawn its claim regarding the treatment of imputed interest expense.

(Slip Op. 94–147)

FORMER EMPLOYEES OF AGIP PETROLEUM, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 94–01–00025

(Dated September 21, 1994)

ORDER OF REMAND

MUSGRAVE, *Judge:* Upon reading and filing defendant's consent motion for remand and all other papers and proceedings, it is hereby

ORDERED that defendant's consent motion for remand be, and it is hereby granted, and it is further

ORDERED that this action be, and it is hereby, remanded to the Department of Labor so that it may conduct an additional investigation regarding plaintiffs' application for certification for trade adjustment assistance under 19 U.S.C. § 2271 *et seq.*, and it is further

ORDERED that:

1. Within 60 days after entry of this order, the Department of Labor will make its remand determination, and, if negative, prepare a supplemental administrative record, and forward the supplemental record to this Court;

2. Within 25 days of the date that Labor has filed the supplemental administrative record with this Court, plaintiffs will advise the Court whether they are satisfied or dissatisfied with the Labor Department's determination upon remand, indicating the areas of dissatisfaction, if any; and

3. Upon receipt of notification of any dissatisfaction with Labor Department's determination upon remand, the Court will provide for an appropriate briefing schedule.

(Slip Op. 94–148)

ZENITH ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 90–07–00339

[ITA determination remanded.]

(Dated September 21, 1994)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for plaintiff Zenith Electronics Corporation.

Collier, Shannon, Rill & Scott (Paul D. Cullen, Jeffrey S. Beckington, Mary T. Staley, David C. Smith. Jr. and *Gail S. Usher)* for plaintiff-intervenors Independent Radionic Workers of America, the international Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO).

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis), Priya Alagiri,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Sukhan Kim, Warren E. Connelly, P.C. and *Margaret L.H. Png)* for defendant-intervenors Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on three motions pursuant to USCIT Rule 56.2 for judgment upon the agency record. The motions have been brought by (1) the Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO) (collectively "the Unions"), (2) Zenith Electronics Corporation, and (3) Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively "Samsung"). The court has consolidated these separate challenges to the determination of the International Trade Administration of the United States Department of Commerce ("ITA" or "Commerce") in *Color Television Receivers from the Republic of Korea,* 55 Fed. Reg. 26,225 (Dep't Comm. 1990) (fourth final admin. review).

STANDARD OF REVIEW

As this consolidated action constitutes a challenge to the final determination of an administrative review, the applicable standard of review is whether the final determination is supported by substantial evidence on the record and is otherwise in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

I. *Adjustment for Value-added Taxes:*

To account for home market value-added taxes ("VAT") forgiven by reason of exportation, Commerce added the amount of VAT to United States price ("USP") and made circumstance of sale ("COS") adjustments to foreign market value ("FMV").[1] 55 Fed. Reg. at 26,226. All parties agree that Commerce may not make a COS adjustment for VAT, as decided by the Federal Circuit in *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1581 (Fed. Cir. 1993). This case is remanded for a recalculation of VAT pursuant to Commerce's new methodology, which was upheld in *Torrington Co. v. United States,* 854 F. Supp. 446, 448–49 (Ct. Int'l Trade 1994) and *Independent Radionic Workers v. United States,* Slip Op. 94–144, at 3–4 (Sept. 16, 1994).

II. *Adjustments for Antidumping Duties:*

Zenith contends that antidumping duties actually paid or to be paid should be deducted from USP pursuant to 19 U.S.C. § 1677a(d)(2)(A),

[1] Commerce did not measure the amount of tax passed through to the home market consumer. 55 Fed. Reg. at 26,226. Samsung no longer contests that Commerce was correct, in light of *Daewoo Elecs. Co. v. United States,* 6 F.3d 1511, 1517 (Fed. Cir. 1993), *cert. denied,* 114 S. Ct. 2672 (1994).

(e)(2) (1988).[2] *See also* 19 C.F.R. § 353.26(a) (1990) (providing for deduction of antidumping duties that producer or reseller paid directly on behalf of importer or reimbursed to importer).

In the final determination, Commerce rejected Zenith's claim for a deduction in the amount of *estimated* antidumping duties. 55 Fed. Reg. at 26,227. Zenith now asserts that adjustments should be made for *actual* antidumping duties. The issues are not the same. *See Zenith Elecs. Corp. v. United States,* Slip Op. 94–146, at 5–6 (Sept. 19, 1994); *PQ Corp. v. United States,* 11 CIT 53, 652 F. Supp. 724 (1987). Therefore, Zenith did not exhaust its administrative remedies as to its actual antidumping duty expense claim.[3]

Moreover, Zenith failed to raise the issue of a deduction for actual antidumping duties in its complaint. *See* USCIT Rule 8(a) (requiring pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); Compl. ¶ 4(h) (alleging that ITA erred by failing to account for estimated antidumping duties). Zenith's motion to amend its complaint was denied. *Zenith Elecs. Corp. v. United States,* Consol. Ct. No. 90–07–00339 (Ct. Int'l Trade July 22, 1994) (order denying Zenith's motion to amend complaint). The issue is thus not properly before this court and the court will not address it.

III. *Allocation of Cash Discounts and promotional Discount Allowances:*

Samsung's original questionnaire response used an allocation methodology to determine cash and promotional discounts in the U.S. market. Resp. Br. of Def.-Ints. Opp'n to Pl.-Ints.' Mot. J. Agency R., Conf. App. 1, at App. C- 16. This methodology divided the total amount of discounts paid during the review period by the total value of all products sold at exporter's sales price ("ESP"). *Id.*[4] For both cash and promotional discounts, the dealer normally deducts an agreed-upon percentage from the invoice amount. *Id.* Conf. App. 1, at 28–29.

In response to Commerce's supplemental questionnaire, Samsung explained that because of the manner in which the discounts were granted, they could not be reported on a sales-specific or product-specific basis. *Id.* Conf. App. 2, at 22–24. Instead, Samsung provided a listing of discounts by dealer. *Id.* at 23–24. The Unions proposed that Commerce apply best information available ("BIA"), using an allocation methodology that divides total per dealer discounts by the sales of sub-

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[2] Section 1677a(d)(2)(A) provides that USP shall be reduced by

> the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States * * *.

19 U.S.C. § 1677a(d)(2)(A). Section 1677a(e)(2) provides that the exporter's sales price ("ESP"), a type of USP, shall be reduced by the amount of "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." *Id.* § 1677a(e)(2).

[3] Zenith argues that waiver of the exhaustion requirement is appropriate because the issue is purely legal and raising it before the agency would have been futile. *See Budd Co. v. United States,* 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). Zenith made the same arguments in its challenge to the results of the third administrative review. The arguments are rejected for the same reasons stated in the court's disposition of that challenge. *Zenith,* Slip Op. 94–146, at 5 n.4.

[4] ESP means "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter." 19 U.S.C. § 1677a(c) (1988).

ject merchandise to each dealer. 55 Fed. Reg. at 26,234. In its final determination, Commerce stated,

> There is no information on the record regarding the ratio of total dealer-specific color television sales to total dealer-specific sales of all products. The methodology proposed by [the Unions) clearly would skew the discount amount * * * to the extent that dealers purchased other products. As best information available, we have used the total discounts and divided them by total dealer sales to obtain an appropriate allocation amount.

Id.

The statute directs the use of BIA "whenever a party * * * refuses or is unable to produce information requested." 19 U.S.C. § 1677e(c) (1988). Commerce's decisions with regard to BIA are accorded considerable deference. *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1191 (Fed. Cir. 1993).

ITA may also use data that are least favorable to a non-complying respondent, based on the common sense inference that if more favorable figures existed, respondent would have submitted them. *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990). This practice "fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference." *Id.* at 1190–91; *see also Allied-Signal,* 996 F.2d at 1192 (explaining that ITA's use of least favorable information "avoids rewarding the uncooperative and recalcitrant party" for failure to supply requested data).

Commerce argues that it did not resort to the adverse allocation methodology advocated by the Unions because Samsung reported the information in the best manner it could, given its accounting system. Commerce exercised its discretion in choosing a methodology that, in its opinion, would avoid skewing discount amounts and thus accomplish the purpose of BIA—to determine margins as accurately as possible. *Rhone Poulenc,* 899 F.2d at 1191. Commerce's choice of BIA is not unreasonable or contrary to law.

IV. *Indirect Versus Direct Selling Expenses:*

A. Credit Sale Rebates

As it did during previous review periods, Samsung granted installment sales incentive rebates at a fixed annual percentage rate. Resp. Br. of Def.-Ints. Opp'n to Pl.-Ints.' Mot. J. Agency R., Conf. App. 1, at App. B–5. These rebates were available to home market distributors who sold to consumers on credit pursuant to the Shin Yong Pan Mae ("SYPM") rebate program. To calculate a per unit amount of the rebate, Samsung divided the total amount of rebates paid on the subject merchandise by the total amount of sales revenue for the subject merchandise. *Id.* Samsung then multiplied the resulting percentage by the price of each individual home market sale under investigation.

In its comments to the preliminary results, Samsung interpreted its rebate data as showing no consistent pattern of a greater rate on larger

or smaller models. Pl.-Ints.' Br. Supp. Not. J. Agency R., App. 2, at 10. In Samsung's view, a single overall rate would provide the most accurate allocation methodology. *Id.* Nonetheless, it submitted model-specific data for Commerce's use. *Id.* App. 2, at 9. The final determination treated the rebates as direct selling expenses, without resorting to the model-specific data. 55 Fed. Reg. at 26,232. It stated,

> Samsung cannot identify which particular sets qualified for the rebate * * *. However, * * * we verified that Samsung credited its dealers with the claimed rebate amounts, and all models were eligible for the rebate program.

Id.

Samsung maintains that it is unable to tie specific rebates to specific sales because the rebate payments were conditioned on sales *by* distributors, not sales *to* distributors. The Unions argue that rebate data must be linked with specific sales or specific models in order to be directly related to sales. Commerce seeks a remand to develop a consistent practice as to installment sales incentive rebates, which were treated as indirect selling expenses in the three prior administrative reviews. *See Zenith,* Slip Op. 94–146, at 13.

In the judicial review of the third final administrative results, this court considered Samsung's allocation methodology to have a sufficiently direct relationship to the sales under investigation. *Id.* at 14–15. The use of model-specific data was not required, because the rebate was calculated at a fixed percentage of sales. *Id.* at 15. The court perceives no benefit in remanding Commerce's treatment of similar expenses in the fourth administrative review, where Commerce classified the expenses as direct. Therefore, this court sustains Commerce's determination in this respect and denies its request for remand to conform its determination to that in previous reviews.[5]

B. Quantity Discounts or Volume Rebates

Samsung claimed a quantity discount adjustment for amounts paid under its major products promotional ("MPP") discount program.[6] If Samsung's home market distributors achieved certain sales levels over a certain period, Samsung paid the distributors a percentage of the total sales revenue for the period. Def.'s partial Opp'n to Def.-Ints.' Mot. J. Agency R., Conf. App., Ex. 2, at 1907A. The percentage rate increased as the monetary value of total purchases increased. *See id.;* Def.-Ints.' Mem. Supp. Not. J. Agency R., at 7.

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[5] The Unions argue that Samsung's methodology does not create a direct relationship to sales because it allocates across all sales, not all rebated sales, and thus allows a deduction for merchandise that did not experience a rebate. As Samsung's questionnaire response makes clear, dividing the rebate amount by the gross sales amount results in a lower percentage than the fixed rate available under the program. Resp. Br. of Def.-Ints. Opp'n to Pl.-Ints.' Mot. J. Agency R., Conf. App. 1, at App. B–5. Thus, each sale is reduced by less than the full rebated amount to account for unrebated sales. Under this methodology, there is little danger of overestimating the discount allowance.

[6] The program applied to sales of color televisions, video tape recorders and microwave ovens.

In its final determination, ITA categorized the MPP program as one granting a cumulative volume rebate rather than a quantity discount. 55 Fed. Reg. at 26,232. It stated,

> [a]djustments for quantity discounts under § 353.55 of the Commerce regulations are based on the premise that higher volume sales lead to cost savings on each individual sale used to establish FMV. Samsung, in fact, demonstrated that the MPP rebate is based on cumulative sales, many of which were low-volume sales.

Id. ITA classified the MPP rebates as direct selling expenses and consequently performed a COS adjustment to FMV. *Id.*[7]

The statute provides for adjustments to FMV, apart from COS adjustments, if a price differential between USP and FMV "is wholly or partly due to" the difference in the commercial quantities in which the merchandise is sold in the United States and the home market. 19 U.S.C. § 1677b(a)(4) (1988). The implementing regulation directs Commerce to consider home market quantity discounts in making its adjustments. 19 C.F.R. § 353.55(a) (1990). ITA will calculate FMV based on discounted sales if (1) the manufacturer granted discounts of at least the same magnitude on 20 percent or more of home market sales during the period of investigation or a more representative period, or (2) the discounts reflect cost savings due to the production of different quantities. *See id.* § 353.55(b) (1990).

Volume rebates, as opposed to quantity discounts, are treated as direct selling expenses if they are directly related to the sales under consideration. *See, e.g., Smith-Corona Group v. United States,* 713 F.2d 1568, 1579–81 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). A quantity discount is normally offered on a single large quantity sale as an up-front reduction in price. *See Silver Reed America, Inc. v. United States,* 12 CIT 39, 47–48, 679 F. Supp. 12, 19, *clarified, on reh'g,* 12 CIT 250, 683 F. Supp. 1393 (1988). A volume rebate is granted at the end of a period for total sales throughout the period. *See Brother Indus., Ltd. v. United States,* 3 CIT 125, 148–49, 540 F. Supp. 1341, 1363 (1982), *aff'd, Smith-Corona,* 713 F.2d 1568.

Samsung's practice of paying a distributor an after-sale amount representing a certain percentage of total sales is more characteristic of a volume rebate than a quantity discount. Therefore, the fact that these rebates were granted on over 20 percent of Samsung's home market sales for a representative period of time is not determinative. *See* 19 C.F.R. § 353.55(b)(1). The regulations concerning quantity discounts do not apply.

Samsung raises two additional contentions: (1) that the MPP rebates were partly or wholly due to differences in quantities sold and (2) that Commerce erroneously relied on a "cost savings" rationale in reaching its decision. In support of the first argument, Samsung cites to data showing that the average quantity sold in a single U.S. transaction was

[7] This adjustment does not give a producer the across-the-board FMV adjustment allowed by ITA's quantity discount methodology. *See Independent Radionic Workers,* Slip Op. 94–144, at 21.

substantially larger than the average quantity in a single home market sale. Reply Br. of Def.-Ints., Conf. App., Tab 1, at App. 1. Samsung fails to establish a causal link between the rebate amounts and the difference in average quantity sold. Therefore, it does not satisfy the requirements for an adjustment under 19 U.S.C. § 1677b(a)(4).

As for Samsung's second contention, it is clear that Commerce did not rely on the cost savings prong of the regulation in refusing to treat the MPP rebates as quantity discounts. Commerce found primarily that the MPP program granted cumulative volume rebates. 55 Fed. Reg. at 26,232. Commerce's statement that "higher volume sales lead to cost savings on each individual sale," *id.*, merely emphasized that quantity discounts, unlike volume rebates, are based on individual sales. ITA properly treated Samsung's MPP rebates as volume rebates entitled to a direct selling expense adjustment.[8]

C. Bad Debt Expense

During the administrative proceedings, Samsung claimed that bad debt expenses incurred during the period of review are entitled to treatment as direct selling expenses. *Id.* Samsung relied on *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 257, 712 F. Supp. 931, 938 (1989), *aff'd in part and rev'd in part on other grounds,* 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied,* 114 S. Ct. 2672 (1994). ITA declined to follow *Daewoo* on the ground that it did not constitute a final decision and was subject to reversal. 55 Fed. Reg. at 26,232. ITA now requests a remand to reconsider the issue.

In *Daewoo,* ITA asserted that bad debt expenses were indirect unless they were incurred on sales under review and the debt was written off during the period of investigation. 13 CIT at 257, 712 F. Supp. at 938. Samsung countered that ITA's treatment of bad debt expenses and warranty expenses was thus inconsistent. *Id.* The court agreed, finding no meaningful distinction

> between warranty expenses, which are supposedly 'always direct,' whether or not they are actually incurred with regard to the sales under review, and bad debt expenses, which are determined to be either 'direct' or 'indirect' depending on whether they are actually incurred with regard to the specific sales under review.

Id. at 258, 712 F. Supp. at 939. According to the court, "[a]bsent any reasonable indication as to why the estimation of bad debt expenses based on past experience is any less reliable than the use of past experience for warranty expenses, this distinction between them is not proper." *Id.* at 259, 712 F. Supp. at 940.

Daewoo does not completely foreclose ITA from treating bad debt expenses as indirect. Nonetheless, ITA had the benefit of *Daewoo* and it neither articulated factors which would distinguish its treatment of bad debt from its treatment of expenses such as warranty, technical services and advertising, nor collected information which would be relevant to

[8] *Cf. Independent Radionic Workers,* Slip Op. 94–144, at 22–23 (remanding to ITA for treatment of volume rebates as direct selling expenses).

such a distinction. The court deems it unwise to reopen this issue to allow ITA to venture down this avenue at this late date in these proceedings. Accordingly, ITA is instructed to treat Samsung's bad debt expenses as a direct selling expense, unless data is lacking or proper allocation is not possible.

D. Home Market Warranty Expenses

Samsung requested ITA to classify as direct all home market warranty expenses, both fixed and variable. 55 Fed. Reg. at 26,232. As support, Samsung cited *AOC Int'l, Inc. v. United States,* 13 CIT 716, 721 F. Supp. 314 (1989). 55 Fed. Reg. at 26,232. ITA denied Samsung's request on the ground that "Samsung never demonstrated that the expenses were directly related to sales." *Id.* ITA referred to its denial of similar claims by other respondents for the reason that the respondents had not demonstrated the factual similarity between their circumstances and *AOC. Id.* at 26,230.

In *AOC,* Commerce denied a direct selling expense adjustment for the labor component of in-house warranty expenses on the ground that these expenses were fixed rather than variable. 13 CIT at 717, 721 F. Supp. at 316. This court rejected "ITA's rationale that the in-house labor costs * * * are fixed overhead costs which a company incurs irrespective of the terms of the sales under consideration." *Id.* at 718, 721 F. Supp. at 316. The court explained,

> [i]t would be contrary to common sense to maintain a warranty servicing department and to pay salaries to the in-house servicemen, if no warranty terms were offered on the CTV sales. Similarly, a much smaller servicing department would be necessary to service warranties with more limited terms.

Id., 721 F. Supp. at 316–17.

The court refused to imply a requirement that each component of warranty costs must independently qualify as a direct selling expense. *Id.* at 719, 721 F. Supp. at 317. It also did not hold "that the eligibility of warranty expenses as directly-related selling expenses *per se* qualifies the labor cost component of the warranty expenses as directly-related selling expense." *Id.*, 721 F. Supp. at 318. Taking the middle path, the court deemed it illogical "to grant an adjustment for the difference in warranty expenses, while disallowing a major cost component of this directly-related selling expense." *Id.*, 721 F. Supp. at 317. *AOC* thus leaves Commerce some discretion in determining whether certain components of the claimed home market warranty costs (other than labor) qualify as direct selling expenses.

In addition, ITA does not distinguish this situation from the second review period, where ITA treated Samsung's variable warranty expenses as direct. *See Independent Radionic Workers,* Slip Op. 94–144, at 26. This issue is thus remanded for ITA to modify its decision in light of *AOC* and to provide a reasoned explanation if it intends to deny direct selling expense treatment to particular claimed warranty cost components.

VI. *Untimeliness of Samsung's Home Market Inventory Carrying Costs Information:*

Samsung argued that ITA should impute inventory carrying costs in the home market as well as in the United States. 55 Fed. Reg. at 26,234. ITA responded that Samsung did not produce data that would allow ITA to do so. *Id.* It agreed with Samsung that carrying costs should be imputed in both markets, but maintained that Samsung did not submit timely information allowing ITA to calculate the number of days between shipment and sale in the home market. *Id.* at 26,229.[9]

Samsung argues that ITA did not request information as to pre-sale inventory carrying costs in either the original or supplemental questionnaire. Moreover, the issue was not treated in the preliminary results published on December 5, 1989. *Color Television Receivers from Korea,* 54 Fed. Reg. 50,258 (Dep't Comm. 1989) (prelim. admin. results). The first mention of it appeared in a December 21, 1989 letter from Commerce informing parties of recognized errors in computer calculations.[10] Def.-Ints.' Mem. Supp. Mot. J. Agency R., Conf. App. C, Tab 7. The letter states only that "[t]he calculation of imputed inventory financing in both FMV and U.S. price calculations was omitted in all four programs." *Id.* In its January 12, 1990 reply brief, Samsung informed ITA that the expense should be based upon the period from the date of shipment from the factory to the date of sale. *Id.* Tab 6, at 9 & n.3.

ITA requests a remand to reconsider its determination. Zenith and the Unions argue that the regulations prohibit any resort to factual information submitted after the publication of the preliminary results, regardless of the reasons. The regulations in effect at the time of the final determination direct parties to submit any factual information at least by the time of the preliminary determination. 19 C.F.R. § 353.31(a)(1)(ii) (1990). They provide that "in no event will the Secretary consider unsolicited questionnaire responses submitted after the date of publication of the Secretary's preliminary determination." 19 C.F.R. § 353.31(b)(2) (1990).[11]

Despite the language of the regulations, this court has found that ITA retains the flexibility to accept the submission of information after expiration of applicable time limits. *See Floral Trade Council v. United States,* 15 CIT 497, 502, 775 F. Supp. 1492, 1499 (Ct. Int'l Trade 1991). If ITA receives important factual information after the publication of the preliminary results, ITA has some discretion to consider it. *Id.; see also Böwe-Passat v. United States,* Slip Op. 93–68, at 7 (May 7, 1993).

In determining whether or not ITA should now be permitted to accept the submissions, the court should consider whether the party has been

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[9] Carrying costs are computed according to the number of days the manufacturer does not receive a return on its merchandise.

[10] ITA apparently changed its methodology for imputing inventory carrying costs between the date of the original questionnaire and the preliminary results. *See Torrington Co. v. United States,* 818 F. Supp. 1563, 1575 (Ct. Int'l Trade 1993).

[11] In contrast, the regulations in force at the time of the original questionnaire requests set no specific timing requirements. *See* 19 C.F.R. § 353.46(a) (1980).

given a reasonable opportunity to satisfy ITA's evidentiary concerns. *Böwe-Passat*, Slip Op. 93–68, at 7–8. Because ITA did not ask for the specific imputed inventory carrying costs information it asserts is needed, before the publication of the preliminary results, ITA's request for remand is granted.

VII. *Calculation of U.S. Value Added:*

To calculate ESP, the statute requires a reduction for value added to the subject merchandise in the United States. 19 U.S.C. § 1677a(e)(3). Samsung exported television parts for assembly in the United States by its related subsidiary and by an unrelated U.S. party. Samsung reported the fees paid to the unrelated U.S. party and maintained that it did not incur any additional general and administrative ("G & A") expenses or indirect selling expenses with respect to this merchandise. The final determination imputed these expenses based on similar expenses attributable to the subsidiary's U.S. assembly operations.

Samsung argues that its fees to the unrelated assembler encompassed all costs associated with the assembling operation, including G & A expenses and indirect selling expenses. Upon review of Samsung's arguments and the administrative record, ITA requests a remand. Zenith and the Unions protest that the fees might have covered the unrelated party's G & A expenses, but that they did not cover Samsung's expenses in dealing with that party.

The regulations provide that ESP should be reduced by the amount of value added in U.S. production or assembly operations, as determined from "the cost of material, fabrication, and other expenses incurred in such production or assembly." 19 C.F.R. § 353.41(e)(3) (1990). Under the facts presented here, the unrelated party assembled the subject merchandise and thus incurred expenses in performing that assembly. These expenses are reflected in the fee charged to Samsung. In its dealings with the unrelated party, Samsung undertook no assembly operations and thus incurred no costs of assembly. Therefore, it properly reported no expenses beyond its fees to the assembler. ITA's request for remand is granted.

CONCLUSION

This case is hereby remanded to Commerce with instructions (1) to apply its new VAT methodology, (2) to treat bad debt expenses as direct selling expenses if the data warrants an adjustment, (3) to reconsider its treatment of home market warranty expenses, (4) to consider home market inventory carrying cost information, and (5) to reconsider imputation of expenses in determining the amount of value added for ESP adjustment purposes. In all other respects, ITA's determination in the fourth administrative review of color televisions from Korea is sustained. Commerce is directed to submit its remand results within 90 days. Any comments thereon are due within twenty days thereafter. Commerce may respond in 12 days.

(Slip Op. 94–149)

SAMSUNG ELECTRONICS CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–04–00327

[ITA determination remanded.]

(Dated September 21, 1994)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for plaintiff Zenith Electronics Corporation.

Collier, Shannon, Rill & Scott (Paul D. Cullen, Jeffrey S. Beckington, Mary T. Staley, David C. Smith, Jr. and *Gail S. Usher)* for plaintiff-intervenors Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO).

Reid & Priest (David A. Gantz and *Jennifer Karas)* for plaintiff Quantronics Mfg. Korea, Ltd.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Priya Alagiri*, Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Sukhan Kim, Warren E. Connelly, P.C. and *Margaret L.H. Png)* for defendant-intervenors Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on four motions pursuant to USCIT Rule 56.2 for judgment upon the agency record. The motions have been brought by (1) the Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers (AFL-CIO) and the Industrial Union Department (AFL-CIO) (collectively "the Unions"), (2) Zenith Electronics Corporation, (3) Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively "Samsung"), and (4) Quantronics Mfg. Korea, Ltd. The court has consolidated these separate challenges to the determination of the International Trade Administration of the United States Department of Commerce ("ITA" or "Commerce") in *Color Television Receivers from the Republic of Korea,* 56 Fed. Reg. 12,701 (1991) (fifth final admin. review).

STANDARD OF REVIEW

As this consolidated action constitutes a challenge to the final determination of an administrative review, the applicable standard of review is whether the final determination is supported by substantial evidence on the record and is otherwise in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

I. *Adjustment for Value-added Taxes:*

To account for home market value-added taxes ("VAT") forgiven by reason of exportation, Commerce added the amount of VAT to United

States price ("USP") and made circumstance of sale ("COS") adjustments to foreign market value ("FMV").[1] 56 Fed. Reg. at 12,702. All parties agree that Commerce may not make a COS adjustment for VAT, as decided by the Federal Circuit in *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1581 (Fed. Cir. 1993). This case is remanded for a recalculation of VAT pursuant to Commerce's new methodology, which was upheld in *Torrington Co. v. United States,* 854 F. Supp. 446, 448–49 (Ct. Int'l Trade 1994) and *Independent Radionic Workers v. United States,* Slip Op. 94–144, at 3–4 (September 16, 1994).

II. *Adjustments for Antidumping Duties:*

Zenith contends that antidumping duties actually paid or to be paid should be deducted from USP pursuant to 19 U.S.C. § 1677a(d)(2)(A), (e)(2) (1988).[2] *See also* 19 C.F.R. § 353.26(a) (1991) (providing for deduction of antidumping duties that producer or reseller paid directly on behalf of importer or reimbursed to importer).

In the final determination, Commerce rejected Zenith's claim for a deduction in the amount of *estimated* antidumping duties. 56 Fed. Reg. at 12,703–04. Zenith now asserts that adjustments should be made for *actual* antidumping duties. The issues are not the same. *See Zenith Elecs. Corp. v. United States,* Slip Op. 94–146, at 5–6 (Sept. 19, 1994); *PQ Corp. v. United States,* 11 CIT 53, 652 F. Supp. 724 (1987). Therefore, Zenith has failed to exhaust its administrative remedies as to its actual antidumping duty expense claim.[3]

Moreover, Zenith failed to raise the issue of a deduction for actual antidumping duties in its complaint. *See* USCIT Rule 8(a) (requiring pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); Compl. ¶ 4(i) (alleging that ITA erred by failing to account for estimated antidumping duties). Zenith's motion to amend its complaint was denied. *Zenith Elecs. Corp. v. United States,* Consol. Court No. 91–04–00327 (Ct. Int'l Trade July 22, 1994) (order denying Zenith's motion to amend complaint). The issue is thus not. properly before this court and the court will not address it.

III. *Indirect Versus Direct Expenses in COS Adjustments to FMV:*

A. Bad Debt Expense

During the administrative proceedings, Samsung claimed that bad debt expenses incurred during the period of review are entitled to treat-

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[1] Commerce did not measure the amount of tax passed through to the home market consumer. 56 Fed. Reg. at 12,702. The Unions have withdrawn their claim contesting Commerce's decision, in light of *Daewoo Elecs. Co. v. United States,* 6 F. 3d 1511, 1517 (Fed. Cir. 1993), *cert. denied,* 114 S. Ct. 2672 (1994).

[2] Section 1677a(d)(2)(A) provides that USP shall be reduced by

> the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States * * *.

19 U.S.C. § 1677a(d)(2)(A). Section 1677a(e)(2) provides that the exporter's sales price, a type of USP, shall be reduced by the amount of "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." *Id.* § 1677a(e)(2).

[3] Zenith argues that waiver of the exhaustion requirement is appropriate because the issue is purely legal and raising it before the agency would have been futile. *See Budd Co. v. United States,* 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). Zenith made the same arguments in its challenges to the results of the third and fourth administrative reviews. The arguments are rejected for the same reasons stated in the court's disposition of those challenges. *Zenith,* Slip Op. 94–146, at 5 n.4; *Zenith Elecs. Corp. v. United States,* Slip Op. 94–148, (Sept. 21, 1994) at 4 n.3.

ment as direct selling expenses. 56 Fed. Reg. at 12,705. Samsung relied on *Daewoo Elecs. Co. v. United States*, 13 CIT 253, 257, 712 F. Supp. 931, 938 (1989), *aff'd in part and rev'd in part on other grounds*, 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied.*, 114 S. Ct. 2672 (1994). ITA declined to follow *Daewoo* on the ground that it did not constitute a final decision and was subject to reversal. 56 Fed. Reg. at 12,705. ITA now requests a remand to reconsider the issue.

In *Daewoo*, ITA asserted that bad debt expenses were indirect unless they were incurred on sales under review and the debt was written off during the period of investigation. 13 CIT at 257, 712 F. Supp. at 938. Samsung countered that ITA's treatment of bad debt expenses and warranty expenses was thus inconsistent. *Id.* The court agreed, finding no meaningful distinction

> between warranty expenses, which are supposedly 'always direct,' whether or not they are actually incurred with regard to the sales under review, and bad debt expenses, which are determined to be either 'direct' or 'indirect' depending on whether they are actually incurred with regard to the specific sales under review.

Id. at 258, 712 F. Supp. at 939. According to the court, "[a]bsent any reasonable indication as to why the estimation of bad debt expenses based on past experience is any less reliable than the use of past experience for warranty expenses, this distinction between them is not proper." *Id.* at 259, 712 F. Supp. at 940.

Daewoo does not completely foreclose ITA from treating bad debt expenses as indirect. Nonetheless, ITA had the benefit of *Daewoo* and it neither articulated factors which would distinguish its treatment of bad debt from its treatment of expenses such as warranty, technical services and advertising, nor collected information which would be relevant to such a distinction. The court deems it unwise to reopen this issue to allow ITA to venture down this avenue at this late date in these proceedings. Accordingly, ITA is instructed to treat Samsung's bad debt expenses as a direct selling expense, unless Samsung failed to supply sufficient data to make a deduction.

B. Home Market Warranty Expenses

Samsung requested ITA to classify as direct all home market warranty expenses, both fixed and variable. 56 Fed. Reg. at 12,706. As support, Samsung cited *AOC Int'l, Inc. v. United States*, 13 CIT 716, 721 F. Supp. 314 (1989). 56 Fed. Reg. at 12,706. ITA denied Samsung's request on the ground that "[u]nder our long-established policy, fixed costs do not qualify as directly related selling expenses." *Id.* As the remand in *AOC* was not yet final and was subject to reversal, ITA declined to overturn its policy. *Id.*

In *AOC*, Commerce denied a direct selling expense adjustment for the labor component of in-house warranty expenses on the ground that these expenses were fixed rather than variable. 13 CIT at 717, 721 F. Supp. at 316. This court rejected "ITA's rationale that the in-house labor costs * * * are fixed overhead costs which a company incurs irre-

spective of the terms of the sales under consideration." *Id.* at 718, 721 F. Supp. at 316. The court explained,

> [i]t would be contrary to common sense to maintain a warranty servicing department and to pay salaries to the in-house servicemen, if no warranty terms were offered on the CTV sales. Similarly, a much smaller servicing department would be necessary to service warranties with more limited terms.

Id., 721 F. Supp. at 316–17.

The court refused to imply a requirement that each component of warranty costs must independently qualify as a direct selling expense. *Id.* at 719, 721 F. Supp. at 317. It also did not hold "that the eligibility of warranty expenses as directly-related selling expense *per se* qualifies the labor cost component of the warranty expenses as directly-related selling expense." *Id.*, 721 F. Supp. at 318. Taking the middle path, the court deemed it illogical "to grant an adjustment for the difference in warranty expenses, while disallowing a major cost component of this directly-related selling expense." *Id.*, 721 F. Supp. at 317. AOC thus leaves Commerce some discretion in determining whether certain components of home market warranty costs qualify as direct selling expenses.

This issue is remanded for ITA to modify its decision in light of *AOC* and to provide a reasoned explanation if direct selling expense treatment is to be denied for certain claimed components (other than labor) of warranty costs.

C. Forwarding Expenses

The Unions challenge ITA's allowance of a direct selling expense adjustment for the labor component of Samsung's home market forwarding expenses. In its questionnaire response, Samsung claimed that it incurred labor costs which involved the hiring of temporary hourly workers, on an as needed basis, who loaded CTVs at the warehouse onto trucks for shipment. Resp. Br. Def.-Ints. Opp'n Pl.-Ints.' Mot. J. Agency R., App. 1, at 2 n.2. This certainly is evidence that these post-sales expenses are directly related to sales. There is, however, some information in the record indicating that these workers were paid vacation bonuses. Resp. Br. Def.-Ints. Opp'n Pl.-Ints.' Mot. J. Agency R., at 51–52. This information belies classification of the workers as temporary, although this does not necessarily preclude direct expense treatment. *See supra* discussion of home market warranty expenses. In connection with the second administrative review, this issue was remanded to Commerce to formulate a consistent position with regard to its direct selling expense standards. *See Independent Radionic Workers*, Slip. Op. 94–144, at 30 (Sept. 16, 1994). It would appear appropriate to insure that the decision here is in harmony with whatever standard is established. The outcomes, of course, may differ depending on the facts established in each record. This issue is therefore remanded to ITA for reconsideration of its treatment of home market forwarding expenses.

IV. *Fluctuating Exchange Rates:*

Quantronics argues that it is entitled to an adjustment for the difference in sales prices in the home market and in the U.S. market that are solely attributable to fluctuating exchange rates. It relies on 19 C.F.R. § 353.60 (1991).[4] It also relies on *Industrial Quimica del Nalon, S.A. v. United States,* 13 CIT 1055, 1063, 729 F. Supp. 103, 110 (1989), for the proposition that § 353.60(b) of the regulation applies to periodic reviews, as well as to the initial fair value investigation. By its terms part (b) does not apply to periodic reviews, as the court recognized in *Sugiyama Chain Co. v. United States,* 16 CIT 526, 538, 797 F. Supp. 989, 1000 (1992). Nonetheless, *Industrial Quimica,* 13 CIT at 1065, 792 F. Supp. at 112, *Sugiyama,* 16 CIT at 538 n.4, 797 F. Supp. 999 n.4, and *Brother Indus., Ltd. v. United States,* 15 CIT 332, 343–44, 771 F. Supp. 374, 385–86 (1991), all recognize that there are instances in which an exchange rate adjustment is permitted even in an administrative review.

Both *Brother* and *Sugiyama* state that respondents, who are already on notice from the antidumping order to monitor their pricing, must demonstrate on the record that the fluctuating "exchange-rate behavior was beyond their ability to compensate." *Sugiyama,* 16 CIT at 538–39, 797 F. Supp. at 1000 (quoting *Brother,* 15 CIT at 343,771 F. Supp. at 385). The court sees no reason to reject this standard. Quantronics, having failed to meet the standard, cannot prevail on its claim.

V. *Use of Third Country Sales:*

Quantronics argues that Commerce should not have used sales in Japan to calculate FMV because the sales were not sufficiently close in time to its U.S. sales. The U.S. sales occurred on January 29, 1988. Commerce used a monthly weighted average for October 1987 sales in Japan. Contrary to Quantronics' contention, Commerce's time period rules for comparison do not require a day to day match. *See* 19 C.F.R. § 353.60(a). For purposes of this case, the monthly average may be considered to be within 90 days of any sale in the third successive month. The court is not inclined to impose a narrow construction on Commerce of its "90/60" rule[5] where the respondent has requested the use of third country prices, as Quantronics did here.[6]

CONCLUSION

This case is hereby remanded to Commerce with instructions to (1) apply the new methodology to VAT, (2) treat bad debt as a direct sel-

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[4] Section 353.60, pertaining to the conversion of currency, provides:

(a) *Rule for conversion.* The Secretary will convert * * * a foreign currency into the equivalent amount of United States currency at the rates in effect on the dates described in § 353.46, § 353.49, or § 353.50, as appropriate.

(b) *Special rules for investigations.* For purposes of investigations, producers, resellers, and importers will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. When the price of the merchandise is affected by temporary exchange rate fluctuations, the Secretary will not take into account in fair value comparisons any difference between United States price and foreign market value resulting solely from such exchange rate fluctuation.

19 C.F.R. § 353.60 (1991).

[5] Commerce looks 90 days back and 60 days forward in attempting to find comparison sales.

[6] Furthermore, Quantronics failed to appear at the scheduled oral argument and neither sought nor obtained permission to submit its motion on briefs. Therefore, its motion is denied based on default as well.

ling expense if sufficient data exists, (3) reconsider home warranty expenses, and (4) reconsider forwarding expenses. In all other respects, ITA's determination in the fifth administrative review of color televisions from Korea is sustained. Commerce is directed to submit its remand results within 90 days. Any comments thereon are due within twenty days thereafter. Commerce may respond in 12 days.

(Slip Op. 94–150)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 92–03–00162

Plaintiff moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record. plaintiff specifically objects to the following actions of the Department of Commerce, international Trade Administration ("Commerce"): (1) exclusion of sample sales and sales allegedly made outside the ordinary course of trade; (2) choice of best information available for missing cost information; (3) failure to deduct related-importer resale profits from U.S. prices when calculating exporter's sales price; (4) refusal to collect estimated antidumping duties on foreign trade zone admissions; and (5) clerical errors.

Held: Plaintiff's motion is granted in part and this case is remanded to Commerce for: (1) reconsideration of its exclusion of sample sales and sales allegedly made outside the ordinary course of trade; and (2) correction of any clerical errors.

[Plaintiff's motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated September 23, 1994)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Julie Chasen Ross, Patrick J. McDonough and *Edith A. Eisner)* for plaintiff, The Timken Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil division, U.S. Department of Justice *(Velta A. Melnbrencis,* Assistant Director); of counsel: *Linda S. Chang* and *Joan L. MacKenzie,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Jesse M. Gerson and *Lawrence M. Friedman)* for defendant-intervenors, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Susan P. Strommer and *Niall P. Meagher)* for defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe, Nathan V. Holt and *Grace W. Lawson)* for defendant-intervenors, NSK Ltd. and NSK Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Timken Company ("Timken"), challenges certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of the second

administrative review of certain tapered roller bearings ("TRBs") from Japan. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 57 Fed. Reg. 4,951 (February 11, 1992).

BACKGROUND

In 1987, Commerce published an antidumping duty order on TRBs from Japan. *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*, 52 Fed. Reg. 37,352 (Oct. 6, 1987).

In 1991, Commerce published the final results of its first administrative review of TRBs covered by the 1987 order. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 41,508 (Aug. 21, 1991). In 1992, Commerce published the final results of its second administrative review of TRBs covered by the 1987 order, covering the period October 1, 1988 through September 30, 1989. *Final Results*, 57 Fed. Reg. 4,951. Timken contests the final results of the second administrative review.

Timken moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record, alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) exclusion of sample sales and sales allegedly made outside the ordinary course of trade; (2) choice of best information available ("BIA") for missing cost information; (3) failure to deduct related-importer resale profits from U.S. prices ("USPs") when calculating exporter's sales price ("ESP"); (4) refusal to collect estimated antidumping duties on foreign trade zone ("FTZ") admissions; and (5) clerical errors.

DISCUSSION

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by Commerce in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Sales Made Outside the Ordinary Course of Trade:*

Commerce has excluded from its calculation of foreign market value defendant-intervenors', NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation ("NTN"), home market sales identified as sales not made in the "ordinary course of trade." Commerce described these sales as trial sales for evaluation by customers, sales of sample merchandise and sales of very

small quantities on a spot basis in unusual circumstances. Commerce determined that exclusion of these sales would not meaningfully affect the results of its review due to the significant number of home market sales transactions. *Final Results,* 57 Fed. Reg. at 4,959.

Timken claims this treatment of the sales is unsupported by substantial evidence and departs from Commerce's prior practice. Timken contends that Commerce's determination is supported only by NTN's assertion that the sales at issue are not in the ordinary course of trade and that sales merely alleged to be outside the ordinary course of trade but not so demonstrated should be included in calculation of foreign market value. *Memorandum in Support of Plaintiff's 56.2 Motion for Judgment on the Agency Record ("Timken's Brief")* at 13–16.

Timken further asserts it is not the number of home market sales excluded that is relevant, but rather, the similarity of those sales to the U.S. sales at issue. Thus, Timken argues, even a single home market sale which is "most similar" to a large volume of U.S. sales would have a significant effect on these results. *Timken's Brief* at 11–13.

Commerce requests a remand so that it may correct a discrepancy between the statement in the final results and the results actually taken. Commerce states that even though the final results state that Commerce excluded all of the sales NTN claimed were not in the ordinary course of trade, certain of those sales so claimed were included in the analysis. *Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Defendant's Brief")* at 7.

NTN contends the exclusion of these sales was proper because Commerce acted within its broad discretion to determine whether a sale is made in the ordinary course of trade. Further, NTN argues Commerce acted consistently with its practice of excluding sales allegedly not in the ordinary course of trade when a respondent demonstrates the sales were in small quantities at prices that were not representative of the vast majority of sales reported. NTN asserts it provided sufficient explanation of the nature and identity of the sales at issue to Commerce and that it is for Commerce, and not Timken, to judge the adequacy of the information submitted. NTN urges this Court to affirm Commerce's decision not to include the sales in its analysis. *Response Brief of Defendant-Intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation to Plaintiff's Motion for Judgment on the Agency Record ("NTN's Brief")* at 6–12.

In addition, NTN alleges Commerce is merely using the pretext of a discrepancy which does not exist to request a remand so that it may reconsider this issue. NTN states that the inclusion of certain sales claimed to be outside the ordinary course of trade was to be considered a clerical error and that Commerce had agreed, in conversations and meetings with NTN, that this error would be corrected by the issuance of amended results. As evidence of this agreement, NTN presents a let-

ter from NTN to Commerce in which NTN notes that this error occurred. NTN states Commerce wishes merely to reconsider the issue through a remand. *Reply of Defendant-Intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, and NTN Corporation to portion of Defendant's Response to Plaintiff's Motion for Judgment on the Agency Record ("NTN's Reply")* at 2–8.

NTN argues that this Court may not order a remand on this issue simply because Commerce has decided it would like to reconsider its determination. Such a remand, after a final determination and a full presentation of arguments at the administrative level, NTN asserts would violate the interests of speedy and fair determinations and administrative finality. According to NTN, a remand would only be appropriate in the case of a ministerial or clerical error and, in this case, Commerce has not alleged any error or mistake of fact. NTN also states that Commerce's power to reconsider a final determination is limited to clerical errors, and does not include power to review the methodology or policy decisions made in a completed review. NTN states that Commerce is simply considering a policy change and wishes to use a court-ordered remand to re-open a decided issue. *Id.* at 9–16. In sum, NTN questions by what authority this Court may remand this issue to allow Commerce to reconsider its final determination. *Id.* at 9.

This Court is clearly vested with the power to order a remand to Commerce. The relevant statutory provision permits this Court the broadest latitude in selecting relief. 28 U.S.C. § 2643(c)(1) (1988). With certain exceptions not relevant here, 28 U.S.C. § 2643(c)(1) permits this Court to order any appropriate form of relief including, but not limited to, orders of remand.

Before ordering a remand, the Court must consider whether an action of Commerce was supported by substantial evidence and was in accordance with law. Upon examination of the administrative record in this case, this Court finds that Commerce's exclusion from its calculation of FMV NTN home market sales identified as not made in the "ordinary course of trade" was not supported by substantial evidence. The record indicates there was little more than an allegation by NTN that the sales at issue were not in the ordinary course of trade. In exhibits B–1–M to B–1–R to its questionnaire response, NTN only segregates sales it regards to be outside the ordinary course of trade, listing transactions which consist of special trial sales to customers for evaluation, sales of samples and sales of very small quantities on a spot basis in unusual circumstances. Public Document Number 43 at 12–13, exhibits B–1–M to B–1–R. Therefore, this Court remands this issue for reconsideration by Commerce.

2. *Choice of BIA:*

Timken contests Commerce's choice of BIA. According to Timken, to calculate adjustments for differences in sales price of similar merchandise, Commerce requested variable cost of production information for

each model sold in the home market and the U.S. When respondents failed to supply cost information for a model, Commerce used twenty percent of a model's variable cost as best information for its matching model when a variable cost value was missing. Timken states that Commerce improperly matched models without cost information in one market with the model with which it would have been matched in the other market had cost information been provided. Timken alleges that, without the missing data, Commerce could not determine the most similar merchandise for proper model matching because part of the model match methodology requires the comparison of variable cost. Timken asserts Commerce should have used the highest margin rate alleged in the original investigation as best information for any sale of a U.S. model where cost information was missing. *Timken's Brief* at 17–19; *Final Results,* 57 Fed. Reg. at 4,952.

Commerce responds that, because Timken did not raise the selection of BIA in its complaint, the issue is not properly before the Court for review. Alternatively, Commerce contends Timken's argument should be rejected because it is at the discretion of Commerce, not the parties, to decide whether to select adverse BIA and how adverse the information should be. Commerce asserts it reasonably selected twenty percent of the cost of manufacturing of either the U.S. or home market model as best information for the missing cost information because, under its model match methodology, a variable cost difference of more than twenty percent will eliminate a model that would be otherwise "similar" for price comparison purposes. *Defendant's Brief* at 8–10.

Defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") point out that the Court rejected Timken's motion to amend its complaint to include this issue and argue that this issue is therefore not properly before the Court. Koyo notes that Timken filed its motion before it received the Court's order denying leave to amend its complaint and assumes that Timken would not have included the issue in its brief had it received the Court's order denying leave to amend. *Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Koyo's Brief")* at 3.

This Court had denied Timken's motion to file an amended complaint to include this issue, by order dated April 13, 1993. Despite this denial, this Court finds that the antidumping statute is silent as to what constitutes best information available. 19 U.S.C. § 1677e (1988). Because Congress explicitly left a gap for the agency to fill, it is within Commerce's discretion to decide what constitutes best information available in a particular case and this Court must grant that decision considerable deference. *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 119192 (Fed. Cir. 1993). It is therefore within Commerce's discretion not to choose BIA most adverse to noncooperating parties. *Saha Thai Steel Pipe Co. v. United States,* 17 CIT ____, ____, 828 F. Supp. 57, 62–64 (1993).

This Court finds that Commerce exercised its discretion in this matter reasonably and in accordance with law. Commerce explained its choice of BIA:

> Because we consider only home market merchandise whose variable costs of manufacture are within 20 percent of those of U.S. merchandise to be of comparable value, we have calculated a difference in merchandise adjustment equal to 20 percent of home market costs as the best information available for U.S. models with no reported variable costs of manufacture.

Final Results, 57 Fed. Reg. at 4,952.

Therefore, this Court finds that Commerce's choice of BIA in this case is supported by substantial evidence and in accordance with law and is hereby affirmed.

3. *Deduction of Profits From Exporter's Sales Price:*

Timken alleges Commerce improperly failed to deduct related-importer resale profits in calculating ESP, asserting that Congress intended such a deduction be made. Timken asserts that this failure undermines the concept of ESP and deprives U.S. industry of the remedy afforded by law. According to Timken, allowing the reseller (the importer) to retain its profit artificially inflates USP and reduces dumping margins. Timken respectfully disputes this Court's previous decisions on this issue, which have upheld Commerce's failure to deduct importer resale profits. *Timken's Brief* at 21–26.

Anticipating defendant's objection to this argument, Timken claims this issue is properly before the Court even though Timken did not raise it at the administrative level, as it is not necessary to raise futile issues at the administrative level solely to preserve them for judicial review. Timken asserts the futility doctrine applies here because Commerce has clearly expressed its position on this issue in numerous past proceedings and to have raised the issue before Commerce would have served no good purpose. Finally, Timken states there is no prejudice to Commerce by Timken raising this issue before the Court. *Timken's Brief* at 20–21.

Because Timken did not raise this issue before Commerce or in its complaint and this Court denied Timken's motion for leave to amend the complaint to raise this issue, defendant argues this issue is not properly before this Court for review. In the alternative, defendant points out the previous occasions on which this Court has rejected Timken's argument on this issue and urges this Court to do so again. *Defendant's Brief* at 10.

Both Koyo and defendant-intervenors NSK Ltd. and NSK Corporation ("NSK") argue that Timken's arguments regarding this issue should not be considered by this Court because the issue was not properly raised by Timken in its complaint. *Koyo's Brief* at 3; *Memorandum of Points and Authorities in Opposition to Plaintiff's 56.2 Motion for Judgment on the Agency Record ("NSK's Brief")* at 2.

Timken, by motion filed March 11, 1993, attempted to amend its complaint to include this issue. This Court rejected Timken's motion by an

order dated April 13, 1993. Although Timken did not exhaust its administrative remedies, this Court agrees that it would have been futile to do so and deems this issue is properly before the Court.

However, having already ruled against Timken on this issue on numerous occasions, this Court rejects Timken's arguments. This Court has consistently held that Commerce is not required to deduct the profits of an importer from its calculation of ESP. *See, e.g., Timken Co. v. United States,* 16 CIT 429, 437, 795 F. Supp. 438, 445 (1992); *see also Timken Co. v. United States,* 10 CIT 86, 102–11, 630 F. Supp. 1327, 1341–48 (1986). This Court adheres to those decisions and, therefore, Commerce's action regarding this issue is affirmed.

4. *Collection of Antidumping Duties in Free Trade Zone:*

Commerce neither obtained information regarding TRBs admitted into a foreign trade zone nor required the collection of antidumping duty deposits on the merchandise. *Final Results,* 57 Fed. Reg. at 4,959. Timken contests this treatment. *Timken's Brief* at 27–35.

Timken alleges Commerce improperly determined that "entry" of merchandise pursuant to the antidumping law takes place only upon release of the merchandise into the U.S. customs territory and not upon its arrival into the geographic confines of the U.S. Timken argues that as the focus of the antidumping law is on importation of subject merchandise and that importation occurs when merchandise enters the geographic U.S., the deposit of antidumping duties should occur upon entry of subject merchandise into FTZs. In addition, Timken points out that foreign merchandise within a FTZ is considered imported for purposes of all U.S. laws except the customs laws of the United States (19 U.S.C. § 81c). Timken then argues the antidumping duty statute is not part of the customs law of the United States. Therefore, Commerce should be required to collect antidumping duties upon the importation into a FTZ of merchandise subject to an antidumping duty order. *Timken's Brief* at 27–35.

Timken also argues that proper reading of the FTZ Act, the antidumping law and a newly-promulgated regulation, which requires importers of subject merchandise to elect privileged status for imports to FTZs, compel Commerce to impose antidumping duties on goods transferred into FTZs. *Id.* at 30–31; *see* 15 C.F.R. § 400.33(b) (1992) (effective from April 6, 1992).

Defendant responds by arguing that the reference to "entry" of merchandise in the antidumping statute unambiguously refers to the release of merchandise into the customs territory of the United States and does not refer to merchandise admitted into a FTZ. Defendant further argues that the reference to "customs laws" in the FTZ Act (19 U.S.C. § 81c) does include antidumping laws, thus exempting merchandise in a FTZ subject to an antidumping duty order from assessment of antidumping duties. Defendant points out that the regulation to which Timken refers requiring importers of merchandise subject to an antidumping duty order to elect privileged status for the merchandise

did not become effective until after the review period and publication of the final results in this case. Therefore, 15 C.F.R. § 400.33(b) does not grant Commerce the authority to order the merchandise in question to be admitted into FTZs under privileged status. *Defendant's Brief* at 10–12.

NSK and NTN agree with the arguments made by Commerce. *NSK's Brief* at 3; *NTN's Brief* at 13.

This Court has previously ruled on this issue and adheres to its decision in *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1572 (1993); *see also Torrington Co. v. United States*, 17 CIT ____, ____, 826 F. Supp. 492, 494 (1993). This Court finds that the Foreign Trade Zone statute on its face exempts foreign merchandise within a FTZ from the imposition of antidumping duties and from being subject to an antidumping administrative review until that merchandise is brought into the U.S. customs territory, unless some other provision of the Foreign Trade Zone statute or the regulations promulgated thereunder require otherwise. *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1572; *see also Torrington Co.*, 17 CIT at ____, 826 F. Supp. at 494. At the time of the imports in question, there was no statute or regulation that required that antidumping duties be imposed on merchandise imported into a FTZ or that such merchandise must be subjected to an antidumping administrative review until the merchandise entered U.S. customs territory.

Subsequent to the issuance of the final results at issue, the FTZ Board revised its regulations to provide that merchandise subject to an antidumping or countervailing duty order which enters an FTZ would be marked "privileged" and, thereby, subject to antidumping and countervailing duty laws. *See* 15 C.F.R. § 400.33(b)(2) (1992).[1]

The merchandise here involved, having been imported into the FTZs as "nonprivileged" merchandise, was transformed in the FTZs Into articles not covered by the antidumping duty order on TRBs, and is not subject to the antidumping order. Thus, Commerce's decision on this issue is affirmed.

5. *Clerical Errors:*

Timken alleges two clerical errors were committed by Commerce. *Timken's Brief* at 36–37. Timken states the wrong year was used on lines 860–61 of NTN's final computer program and lines 199–203 of NSK's final computer program fail to delete home market below-cost of production sales which are compared to U.S. sales. Commerce agrees these errors occurred and requests that this case be remanded for their correction. *Defendant's Brief* at 12.

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[1] Section 400.33(b), which became effective April 6, 1992, provides the following:

(b) *Restrictions on items subject to antidumping and countervailing duty actions*—(1) *Board policy.* Zone procedures shall not be used to circumvent antidumping (AD) and countervailing duty (CVD) actions under 19 CFR parts 353 and 355.

(2) *Admission of items subject to AD/CVD actions.* Items subject to AD/CVD orders or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures, if they entered U.S. Customs territory, shall be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone. Upon entry for consumption, such items shall be subject to duties under AD/CVD orders or to suspension of liquidation, as appropriate, under 19 CFR parts 353 and 355.

NTN agrees that the wrong year was used on the final computer program and that this error should be corrected. *NTN's Brief* at 13.

According to NSK, no error occurred as to the deletion of home market below-cost of production sales. NSK contends the alleged error did not occur because Commerce made no price-to-price comparisons with merchandise determined to have been sold at less than the cost of production for an extended period of time. NSK reads lines 647 and 699–702 of Commerce's computer program as indicating that comparisons were made on the basis of constructed value, not price, when the home market product failed the cost test. NSK adds that Commerce's computer printouts also demonstrate that when merchandise failed the cost test, comparisons were made on the basis of constructed value, not price. *NSK's Brief* at 4–6.

Timken responds arguing that NSK has misinterpreted Timken's allegation. Timken states it does not contest that Commerce made price-to-price comparisons of U.S. sales solely to home market models which failed the cost test. Its argument is that sales of certain models which were below-cost and made in substantial quantities over an extended period of time were incorrectly included in the calculation of weighted-average home market prices along with above-cost sales of the same models. Timken asserts the computer program does not delete any sales of models for which more than ten percent but less than ninety percent of sales are below cost and it is the retention of these sales for comparison that Timken disputes. *Plaintiff's Reply to Defendant's and Defendant-Intervenors' Responses to Plaintiff's Motion for Judgment on the Agency Record* at 23–24.

The Court remands this issue for the correction of the year used on lines 860–61 of NTN's final computer program and for Commerce to determine whether NSK's final computer program fails to delete home market below-cost of production sales which are compared to U.S. sales. If the program does fail to delete below-cost sales, Commerce is to correct the error so that the proper sales are deleted.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce for: (1) reconsideration of its exclusion of sample sales and sales allegedly made outside the ordinary course of trade; and (2) correction of any clerical errors. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/93 9/20/94 Goldberg, J.	J.J. Abbott Inc.	91-08-00626	8443.50.1000 5.1%	8439.30.0000 2%	Agreed statement of facts	Baltimore Paper varnishing machine, "Uvimat 102"
C94/94 9/20/94 Goldberg, J.	Minnesota Mining & Manufacturing Co.	92-10-00657 93-04-00207 93-09-00524	9017.90.00 5.8% 9802.00.50 Free 8479.90.80 3.7% 9017.20.80 5.8% etc.	8473.30.40 Duty free 8471.92.90 3.7%	Agreed statement of facts	Minneapolis Spare parts for monochrome and color laser imager bases, monochrome and color laser imager bases
C94/95 9/21/94 Goldberg, J.	General Electric Co.	94-06-00329	2811.22.10.00 3.7%	2811.22.50.00 Duty free	Agreed statement of facts	Cleveland Pure synthetic silica powder

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